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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 255

LOUIS E. RODDEWIG, AS CHAIRMAN OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, ETC., ET AL., PETITIONERS,

vs.

SEARS, ROEBUCK AND CO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

PETITION FOR CERTIORARI FILED JULY 18, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

SUPREME COURT OF THE UNITED STATES

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N SUPREME COURT OF IOWA, JANUARY TERM, 1940

9-44997. Equity

SEARS, ROEBUCK AND CO., Appellee,

vs.

LOUIS E. RODDEWIG, as Chairman of the Iowa State Board of Assessment and Review, and Individually; D. L. Murrow and C. Frank Green, as Members of the Iowa State Board of Assessment and Review, and Individually, Appellants

Appeal from District Court of Polk County, Iowa, Honorable John J. Halloran, Judge

Appellants' Abstract of the Record—Filed July 21, 1939

fol. 2] On the 24th day of September, 1938, the plaintiff, Sears, Roebuck and Company filed in the District Court in and for Polk County, Iowa, the following petition in equity:

PETITION

Comes now the plaintiff, Sears, Roebuck and Co., and for cause of action against the defendants states and shows to the Court as follows:

1. That plaintiff is a corporation organized under the laws of the State of New York, with its principal operating office in the City of Chicago, Illinois. Plaintiff is engaged in the business of retail merchandising.

2. That defendant, Louis E. Roddewig, is the duly appointed, qualified and acting Chairman of the Iowa State Board of Assessment and Review; that defendant, D. L. Murrow, is the duly appointed, qualified and acting Vice Chairman of said Board, and defendant, C. Frank Green, is a member thereof. All defendants have their official residence in the City of Des Moines, Iowa. The defendants, as members of the Iowa State Board of Assessment and Review, are by statute vested with jurisdiction and authority to administer the tax laws of the State of Iowa, and are

particularly given jurisdiction and authority to enforce the provisions of Chapter 198 of the Acts of the Forty-seventh General Assembly of the State of Iowa, commonly known as the "Use Tax Act."

3. That under the provisions of the laws of the State of Iowa, as evidenced by Chapter 386, Code of Iowa 1927 (same, Code of Iowa, 1935), a copy of which is hereto annexed, marked Exhibit "D" and by this reference hereby made a part hereof, any corporation for pecuniary profit organized under the laws of another state which desires to transact business in the State of Iowa is required to file with the Secretary of State a certified copy of its articles [fol. 3] of incorporation, accompanied by a resolution of its Board of Directors or stockholders authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in the State of Iowa engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in Iowa. Such application is required to contain a statement of the value of all money or other property the corporation has in use or held as an investment in the State of Iowa at the time the statement is made, and which it proposes or expects to make use of in the State of Iowa during the ensuing year. Such laws also require the payment of a fee of twenty-five dollars upon ten thousand dollars or less of money or property of such company actually within the State, and one dollar for each one thousand dollars of such money or property within the State in excess of ten thousand dollars, and upon compliance therewith the Secretary of State is required to issue to such corporation a permit for the transaction of business of such corporation within the State, upon the receipt of which it shall be permitted and authorized to so conduct and carry on its business. Such laws also require, at least annually, a statement of increase in capital, and a payment of additional fees for any such increase in capital. For a violation of the provisions of said Chapter 386 there is provided a penalty of one hundred dollars for each and every day in which such business is transacted or carried on.

Pursuant to the provisions of said laws, plaintiff, on or about June 26, 1928, made application for such permit in complete compliance with said laws, and paid to the Secretary of State of Iowa the sum of $50.00, whereupon the

Secretary of State issued to it a permit authorizing it to conduct and carry on its business as a foreign corporation in the State of Iowa. Said permit has never been revoked, [fol. 4] and since the issuance thereof has at all times been and now is in full force and effect. Subsequently said plaintiff made reports to the Secretary of State of the increase in the amount of its capital, and on account thereof on September 20, 1929, paid to the Secretary of State the sum of $142.00, on July 29, 1930, the sum of $59.00, on August 28, 1934, the sum of $44.00, on August 23, 1935, the sum of $129.00, on August 20, 1936, the sum of $39.00, and on August 2, 1937, the sum of $75.00.

Subsequently to and shortly after the issuance to it of said permit to conduct and transact its business as a foreign corporation in the State of Iowa, plaintiff commenced to conduct a retail merchandising business in said State by opening and operating at various locations from time to time retail department stores wherein it sells and offers for sale extensive lines of goods, wares, and merchandise. Plaintiff now owns, maintains, and operates within the State of Iowa twelve retail department stores, at which it sells at retail varied lines of goods, wares and merchandise.

Plaintiff has entered into long-time leases covering the locations in which it conducts said retail business, all of which extend for a substantial period of years. The majority of the leases at the larger stores within the State of Iowa are for periods of ten to twenty years, and all of said leases have a number of years yet to run. Said leases are not subject to cancellation, and plaintiff is obligated to continue payments of rentals thereunder. In addition to the investment in and liability upon the leases upon its store locations within the State of Iowa, plaintiff has expended large sums of money in equipping said stores with furniture, fixtures and appliances necessary for the conduct of retail department stores, and has stocked said stores with extensive lines of merchandise. That plaintiff's investment in furniture, [fol. 5] fixtures, equipment and stocks in the State of Iowa exceeds the sum of $500,000.00, and its liability upon the unexpired terms of leases entered into amounts to many thousands of dollars.

When it entered the State of Iowa and commenced to transact business therein, and since, and when it expended money in equipping and stocking its stores within said

state, and when it obligated itself under said long-term leases, plaintiff relied upon the rights and privileges given and inuring to it by and under said permit or contract, in the light of the statutes and Constitutions of the State of Iowa and of the United States.

4. That on March 31, 1937, Chapter 196 of the Laws of the Forty-seventh General Assembly of the State of Iowa became effective by publication. That in and by Section 11 thereof, a true copy of which is hereto attached, marked Exhibit "E", and by this reference hereby made a part hereof, it is provided that it shall be unlawful for any person to engage in or transact business as a retailer within the State unless a permit or permits shall have been issued to him as therein prescribed. And in and by subparagraph 2 of Section 16 of said Chapter 196, a true copy of which is hereto attached, marked Exhibit "F", and by this reference hereby made a part hereof, it is provided that any person who shall sell tangible personal property at retail without procuring a license, as provided in said Section 11, or whose license shall have been revoked, shall be guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment in the discretion of the court.

That plaintiff now conducts its said retail merchandising business in the State of Iowa in twelve separate stores, and did apply for and procure from the Iowa State [fol. 6] Board of Assessment and Review permits pursuant to the provisions of said Section 11 of said Chapter 196 of the Laws of the Forty-seventh General Assembly, for each of its said stores, which permits are in full force and effect. That the aggregate annual sales at retail in its said twelve stores located within the State of Iowa exceed the sum of $2,500,000.00. That plaintiff has collected the retail sales tax as prescribed by said Chapter 196 of the Laws of the Forty-seventh General Assembly on account of said sales and paid the same in accordance with said Act to the State of Iowa.

That in each of its said retail merchandising stores so located in the State of Iowa, plaintiff has, since April 16, 1937, from time to time accepted orders for merchandise and tangible personal property, which said orders were filled by shipments of such merchandise or tangible per-

sonal property from points without the State of Iowa to the purchaser in Iowa, and upon all of such orders and shipments plaintiff has reported and paid to the Iowa State Board of Assessment and Review the amount of the use tax so provided in and by the terms of the Use Tax Statute of the State of Iowa, a copy of which is hereto annexed, marked Exhibit "A". And plaintiff has also reported and paid to the State Board of Assessment and Review, the amount of the use tax provided by said Use Tax Act representing two per cent of the purchase price of all tangible personal property purchased without the State of Iowa and transported to its said stores in the State of Iowa for its own use and not for resale. That the amount of such payments of said use tax, representing such transactions to and including March 31, 1938, aggregated the sum of $7,853.02.

5. That for many years past, and continuously to the present time, and long prior to its entry into the State of [fol. 7] Iowa, plaintiff was extensively engaged in the business of selling goods, wares and merchandise at retail through the medium commonly known as the "mail order" business, to customers in the State of Iowa as well as in substantially all the other parts of the United States. Plaintiff has, and does now maintain in the City of Chicago, Illinois and other cities of the United States mail order stores or establishments from which it customarily distributes by United States mail and other public carriers to prospective customers located in the State of Iowa and elsewhere, catalogs and price lists describing by illustration and otherwise the character, quality and price of the goods offered for sale by plaintiff. That prospective customers desiring to purchase goods or merchandise make out and transmit their orders therefor to said mail order stores outside the State of Iowa, accompanied by the cash purchase price of the articles which they desire to purchase. The customers usually specify the transportation means which they desire used to effect delivery to them, and the customers pay the transportation cost of such merchandise from the City of Chicago or from such other points without the State of Iowa from which the goods are shipped to the purchasers. And the fact that such goods will be shipped to such purchasers who are resident in the State of Iowa in interstate commerce is known to such purchasers when their orders

are sent to the said mail order houses. All such orders are either accepted or rejected at the mail order stores to which they are sent, with few exceptions. That in addition to its main store and office located in the City of Chicago, Illinois, plaintiff owns and operates certain other branches and distributing warehouses at points outside the State of Iowa from which particular kinds of merchandise ordered by its customers is customarily shipped to points within the State of Iowa. When orders transmitted to plaintiff [fol. 8] by its customers are accepted, plaintiff ships the merchandise so ordered to its customers within the State of Iowa by whatever transportation means were specified by the customer.

6. That plaintiff has in the State of Iowa large numbers of customers who regularly purchase from it the goods, wares and merchandise offered through its catalogs and price lists. Plaintiff through a long period of years has built up a large volume of such mail order business with persons residing within the State of Iowa and elsewhere, and through its conduct and fair dealing with such customers has acquired an established reputation and standing in the mail order business, and has acquired the substantial good will of its customers, and that the sales to its customers located within the State of Iowa constitute a substantial portion of the business done by plaintiff through the "mail order" method.

7. That the mail order business so conducted by plaintiff constitutes sales in interstate commerce, and that the State of Iowa has no jurisdiction to impose taxes upon such sales or to otherwise burden or regulate such transactions by the imposition of tax laws or otherwise, and that plaintiff cannot be required under the laws and Constitution of the United States to secure from the State of Iowa, or its administrative officers or bodies, any license to engage in such business.

8. Plaintiff attaches hereto a true and correct copy of the so-called "Use Tax Act" of the Forty-seventh General Assembly of the State of Iowa, which became effective by publication on April 15, 1937. Said copy is identified as Exhibit "A" hereto, and is by this reference made a part hereof as fully as though set forth herein at length. That by the terms of said Act an excise tax is imposed on

the use in the State of Iowa of tangible personal property [fol. 9] purchased on or after the effective date of the Act, at the rate of two per cent of the purchase price of said property. That articles purchased outside the State of Iowa for use within the State, but subjected to a retail sales tax at the place of such purchase, are exempted from the tax if the tax imposed thereon was equal to or greater than that imposed by the Iowa Retail Sales Tax Act. By Section 4 of the so-called "Use Tax Act" it is provided that "evidence that tangible personal property was sold by any person for delivery in this state, shall be prima facie evidence that such tangible personal property was sold for use in this state." By the provisions of Section 8 of said Use Tax Act, every retailer maintaining a place of business within the State and making sale of tangible personal property for use within the State where such sales are not exempted under the provisions of Section 3 thereof, nor collectible under the provisions of Section 6 thereof, is required at the time of making such sales "whether within or without the State", to collect the tax imposed by the Act from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the Iowa State Board of Assessment and Review. By the provisions of Section 3 of said Use Tax Act, the use of tangible personal property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Senate File 316, Acts of the Forty-seventh General Assembly (Sales Tax Act, Chap. 196, 47th G. A.), are specifically exempted. Plaintiff has collected and paid, and now collects and pays, the Iowa Retail Sales Tax prescribed by said Senate File 316, Acts of the Forty-seventh General Assembly of the State of Iowa, upon all sales at retail consummated and completed in its stores within the State of Iowa, and plaintiff has paid to the Iowa State Board of Assessment and Review, the amount of the use tax so [fol. 10] provided in said Use Tax Act on all sales of tangible personal property made in any of its stores located in the State of Iowa when such tangible personal property thus sold was shipped from points without the State of Iowa to the purchaser in Iowa. But plaintiff has never collected nor paid the so-called use tax upon its mail order sales made from its Chicago, Illinois, store or other stores or branch warehouses or factories located outside the State of Iowa, for shipment to persons located within the State

of Iowa pursuant to orders so sent by such persons to such stores or warehouses or factories, outside the State of Iowa. The retail stores of plaintiff in the State of Iowa do not issue any catalogs and do not fill any orders directed to the mail order department of plaintiff.

9. That there are numerous persons, firms and corporations who maintain no place of business within the State of Iowa for the conduct of retail merchandising of tangible personal property, and who maintain and operate so-called mail order stores in the City of Chicago, Illinois, and elsewhere in the United States, from which tangible personal property is sold and distributed to customers by the so-called mail order method, that is, through sales made wholly in interstate commerce, although the tangible personal property thus sold to residents of the State of Iowa is or may be for use within said State. That said other mail order businesses are in direct competition with this plaintiff, particularly in the State of Iowa; and on information and belief, plaintiff alleges that the volume of such mail order transactions between such competitors and residents of the State of Iowa has heretofore been and is now substantial, and will continue to be substantial: but plaintiff alleges that said competitors are not and cannot be required to collect from such mail order customers the use tax imposed by the Use Tax Act of the State of Iowa, nor to remit [fol. 11] the same to the State of Iowa, or otherwise comply with such Use Tax Act in respect of tangible personal property sold by them and delivered to purchasers within the State of Iowa, and notwithstanding that such tangible personal property is used within said State.

That such tangible personal property thus sold by such competitors of this plaintiff to residents of the State of Iowa is substantial and is of the same general type and character as the tangible personal property sold by plaintiff to residents of the State of Iowa through its "mail order" business,—that is, in interstate commerce. That such mail order business in respect of most of the articles dealt in is highly competitive, and the merchants engaged therein largely depend upon their ability to sell at a favorable price to the purchaser; so that the success or failure of such business depends to a great extent upon the ability of the merchant to meet the prices maintaining in the general mail order market. If plaintiff is compelled to add to

its prices of the tangible personal property that it sells in the mail order business, in interstate commerce, the amount of the use tax imposed by the Use Tax Act of the State of Iowa, it will be subjected to undue and disastrous competitive results by reason of the fact that its aforesaid competitors, being under no obligation to collect the use tax, will be able to offer a more favorable price: and thus the plaintiff will be subjected to an unlawful discrimination and denied the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

10. That defendants, acting in their capacity as members of the Iowa State Board of Assessment and Review and purporting to act under the authority vested in them by the said Iowa Use Tax Act, have construed said statute as authorizing and empowering them to require plaintiff [fol. 12] at the time of making sales of tangible personal property for delivery in the State of Iowa, even though such sales are made and consummated outside the State of Iowa, and even though plaintiff has no actual knowledge that such property is to be used within the State of Iowa, to charge and collect from its mail order customers located within the State of Iowa the so-called Iowa use tax amounting to two per cent of the purchase price of said articles. That the said statute as so construed and applied by the defendants and by the administrative officers of the State of Iowa is unconstitutional and void, in that it results in the imposition of a tax upon sales in interstate commerce at the time of the making of such sales and long before the tangible personal property, the subject of such sales, has been delivered in the State of Iowa, and long before such property has been subjected to use by residents of the State of Iowa, contrary to the provisions of Section 8 of Article I of the Constitution of the United States, which provides that the Congress of the United States shall have exclusive power to regulate commerce with foreign nations and among the several states. And that said statute as so construed and applied by said defendants and the administrative officers of the State of Iowa, is further unconstitutional and void in that it constitutes a regulation of the mode in which the plaintiff is required to conduct its business without the boundaries of the State of Iowa, and constitutes the making of the plaintiff an assessor and a

collector of taxes outside the boundaries of the State of Iowa, all contrary to and in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

11. That on or about the 20th day of March, 1938, at a session of the Iowa State Board of Assessment and Review, defendants, purporting to act in their capacities as members [fol. 13] of said Board, adopted a resolution, a true copy of which is hereto attached marked Exhibit "B", and by this reference is made a part hereof. On the 30th day of March, 1938, the defendants, purporting to act in their capacities as members of said Board, caused to be served on plaintiff at Des Moines, Iowa, a notice, a true and correct copy of which is hereto attached marked Exhibit "C", and by this reference made a part hereof. That the hearing originally set before said Board for April 19, 1938, was continued and postponed until May 9, 1938.

Plaintiff on May 2, 1938, filed in the District Court of the United States for the Southern District of Iowa, Central Division, its bill of complaint, seeking an order, as well as an injunction, restraining and enjoining the defendants from taking any steps to oust plaintiff from the State of Iowa or to interfere with its right to do business within said state, and from enforcing or attempting to enforce as against the plaintiff the so-called Use Tax Act of the State of Iowa. And, such temporary restraining order was granted and issued by said United States District Court for the Southern District of Iowa on May 18, 1938, and continued in force until the 26th day of August, 1938, when said action was dismissed and said restraining order annulled on the sole ground that the court was without jurisdiction to entertain said cause because of the amendment of 1937 by Congress depriving the United States District Court of jurisdiction to issue injunction or restraining orders concerning the assessment or collection of taxes by any state.

Plaintiff alleges that if said hearing before the State Board of Assessment and Review is held, that said Board will make a finding that plaintiff has violated the provisions of the Use Tax Act by failing and refusing to collect upon its mail order sales to persons within the State of Iowa [fol. 14] the so-called "Iowa Use Tax" amounting to two per cent thereof, and because of said alleged violation de-

fendants will revoke the plaintiff's license as a retailer under the Iowa Sales Tax Act, and will certify to the Secretary of State of the State of Iowa a copy of its order finding that plaintiff has failed to comply with the order of said Board, and that by the provisions of Section 21 of the Use Tax Act, upon receipt of such certification it is made the mandatory duty of the Secretary of State of the State of Iowa to revoke plaintiff's license and qualification to do business as a foreign corporation within the State of Iowa. That if the license of plaintiff as a foreign corporation in the State of Iowa and its license as a retailer under the Iowa Retail Sales Tax Act are revoked by the defendants or by the Secretary of State of the State of Iowa, plaintiff cannot lawfully carry on its retail business within said state, and that it will be deprived of its property rights within said state, and will thereby be subjected to irreparable damage and will be deprived of its investment in retail establishments within the State of Iowa, amounting to largely in excess of Five Hundred Thousand Dollars.

That the said license or permit so granted to plaintiff to transact business within the State of Iowa as a foreign corporation under the circumstances hereinbefore alleged, and the said several permits so granted to plaintiff to conduct its retail merchandising business in each of its twelve stores located within the State of Iowa under the circumstances hereinbefore alleged, constitute property rights and valid and subsisting contracts between the State of Iowa and plaintiff; and the revocation of such permit to transact business in the State of Iowa as a foreign corporation and such permits to conduct a retail merchandise business in its said several stores in Iowa, will result in the deprivation by the State of Iowa of the property of plaintiff without [fol. 15] due process of law, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and will result in the impairment of the obligation of said contracts, contrary to the provisions of Section 10 of Article I of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts.

12. Plaintiff maintains no separate record of individual sales to customers residing within the State of Iowa, nor any other records which permit the segregation of mail order sales to customers residing in the State of Iowa, or

for use in the State of Iowa, from other sales made by plaintiff through its mail order houses. The maintenance of such records in plaintiff's mail order houses would constitute a substantial expense, and plaintiff avers that such records are not customarily kept and maintained by other persons engaging in the mail order business in competition with plaintiff who sell to persons located in the State of Iowa.

13. Plaintiff avers that the said Use Tax Act of the State of Iowa as construed and applied by the defendants insofar as it requires plaintiff to charge and collect said use tax upon sales made to persons within the State of Iowa as a result of mail orders received and accepted at its places of business without the State of Iowa, and which sales were filled by shipments from without the State of Iowa to persons within the State of Iowa, contravenes the provisions of the United States Constitution in the following particulars, and as to plaintiff said statute is null and void because in conflict with the provisions of the Constitution of the United States in the following particulars, to-wit:

(1) The requirement that plaintiff collect such tax and issue to purchasers receipts showing the amount of such [fol. 16] use tax, constitutes a direct burden and restriction upon the privilege of engaging in interstate commerce, and constitutes a violation of Section 8 of Article I of the Constitution of the United States.

(2) The requirement that plaintiff collect the so-called "Use Tax" on sales made to persons within the State of Iowa constitutes a direct regulation of commerce between the several states, in direct violation of the provisions of Section 8 of Article I of the Constitution of the United States.

(3) That the provisions of Section 4 of the Iowa Use Tax Act which render the fact that tangible personal property is sold for delivery in the State of Iowa prima facie evidence that such sale is for use in the State of Iowa, are arbitrary, capricious and void, and in contravention of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(4) That the provisions of said Use Tax Act making plaintiff primarily liable for the amount of the tax, and

requiring plaintiff to collect and remit such tax, as construed by the defendants, imposes a liability upon plaintiff solely because of the exercise by plaintiff of the privilege of engaging in the interstate commerce transactions hereinbefore described, and in direct violation of the provisions of Section 8, Article I of the Constitution of the United States.

(5) That the provisions of the Use Tax Act requiring plaintiff to act as a collector of a tax imposed by the State of Iowa upon interstate commerce transactions engaged in by plaintiff, directly burdens and constitutes a regulation of interstate commerce in violation of the provisions of Section 8 of Article I of the Constitution of the United States.

[fol. 17] (6) That as construed and applied by defendants, the Iowa Use Tax Act imposes upon sales made by plaintiff in interstate commerce a direct tax, and exacts of plaintiff a tax for the privilege of engaging in interstate commerce, all in violation of Section 8, Article I of the Constitution of the United States.

(7) As construed by defendants, the provisions of said Use Tax Act which authorize the defendants and the Secretary of State of the State of Iowa to revoke the plaintiff's right to do business within the State unless plaintiff submits to an unauthorized and unconstitutional tax upon its interstate commerce transactions, deprives plaintiff of its property within the State of Iowa without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(8) That insofar as the said Use Tax Act as construed and applied by the defendants undertakes to authorize the defendants and the Secretary of State of the State of Iowa to revoke plaintiff's permit to transact business in the State of Iowa as a foreign corporation, or to revoke plaintiff's several licenses to conduct its business as a retail merchant in its several stores is unconstitutional and void, because it impairs the obligation of valid and subsisting contracts contrary to the provisions of Section 10 of Article I of the Constitution of the United States.

(9) That the requirements of said Use Tax Act as construed and applied by said defendants, unreasonably discriminate against plaintiff in its right to transact business

within the State, unless plaintiff submits to an unconstitutional and unwarranted exaction of a tax upon its transactions in interstate commerce, and thereby plaintiff is de- [fol. 18] prived and denied the equal protection of the laws of the State of Iowa, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

(10) That the requirement that plaintiff collect and remit the use tax on sales made by plaintiff at retail at points outside the State of Iowa, violates Section 10 of Article I of the Constitution of the United States, in that the Use Tax Act in substance and effect, and as construed by the defendants herein, amounts to an impost or duty on merchandise imported into the State of Iowa from points outside said state, and that the consent of the Congress of the United States to such impost or duty has never been procured.

(11) That said Use Tax Act, as construed and applied by the defendants, requires plaintiff upon its activities without the State of Iowa, to collect for the benefit of the state a tax, and that the action of the defendants constitutes an effort to apply and enforce the laws of the State of Iowa beyond the boundaries of said State, and that thereby plaintiff is deprived of property without due process of law, in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(12) The requirement that this plaintiff act as a tax collecting agent of the State of Iowa at a point outside the State of Iowa, is an attempt of the State of Iowa to enforce its laws extraterritorially.

(13) The requirement of said Use Tax Act, as construed and applied by defendants, that plaintiff must collect the use tax upon sales of merchandise in interstate commerce merely because plaintiff operates retail stores within the State of Iowa, discriminates between plaintiff and other [fol. 19] competing mail order houses making similar sales to persons within the State of Iowa, but which do not maintain retail stores or establishments within said State, and that thereby plaintiff is denied the equal protection of the law and deprived of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

(14) That the Use Tax Act, as construed and applied by the defendants in requiring plaintiff to collect the so-called "Use Tax" upon sales to persons within the State of Iowa, is arbitrary, capricious, vague and uncertain, in that the fact that the sale of goods to persons in the State of Iowa has no direct connection with the use of said merchandise in said state. Plaintiff avers that it frequently sells merchandise to be shipped to points within the State of Iowa which is to be used by the purchaser at points without the State of Iowa, and that the statute as construed and applied by the defendants requires plaintiff to determine at its peril as to where such merchandise will be used by the purchaser, and that thereby plaintiff is deprived of its property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

14. Plaintiff avers that unless defendants are enjoined and restrained from proceeding with the threatened revocation of plaintiff's permit to do a retail business within the State of Iowa, and its license as a non-resident corporation within said State, irreparable injury will result to it, in that the substantial business in the State of Iowa which plaintiff has built up since the year 1929 will be wholly destroyed, and plaintiff will be substantially de-
[fol. 20] prived of its investment in leases, store fixtures, appliances and equipment, and in inventories of merchandise located within said State. In addition thereto, plaintiff will be deprived of the good will which it has acquired and which is dependent upon its continued ability to serve its customers, and to service merchandise, such as electric refrigerators, washing machines, power implements, oil burners and other merchandise requiring service and repairs from time to time. Plaintiff has no plain, speedy and adequate remedy at law, and no administrative remedy, by appeal or otherwise from the threatened order of revocation of its permits and license to do business in the State of Iowa.

15. Plaintiff avers that unless enjoined and restrained by the order of this Court, defendants acting in their capacities as administrative officers of the State of Iowa, will proceed with the hearing referred to in the notice, Exhibit "C", and will revoke the retailer's permit of plaintiff, and that by the provisions of Section 21 of said Use

Tax Act, it is made the mandatory duty of the Secretary of State to revoke plaintiff's license to do business, and that such revocation will follow, unless the defendants are restrained by the order of this Court from taking such action. That in order to preserve the rights of the plaintiff in the conduct of its business within the State of Iowa, it is necessary that a temporary injunction be issued by this Court restraining and enjoining, until the trial of this action, the defendants and their servants and employes, and all persons acting under the authority of their offices, from taking any steps or interfering with the conduct of plaintiff's retail business within the State of Iowa.

Wherefore, and to the end that plaintiff may not suffer irreparable injury and damage, and may be permitted to continue its valid, legal retail business within the State of [fol. 21] Iowa, and to preserve its vested property rights acquired under the valid laws of said state, plaintiff prays that the defendants and each of them, individually and in their capacities as chairman and members of the State Board of Assessment and Review, appear to and make answer to this petition within the time and manner required by law, and

That the said act of the General Assembly of the State of Iowa known as the "Personal Property Use Tax Act" and being numbered Senate File 317 of the Forty-seventh General Assembly, and having been approved by the Governor of the State of Iowa on, to-wit, April 12, 1937, be adjudged and declared to be null and void and of no force and effect whatsoever upon the grounds and for the reasons set out and alleged in this petition, and upon such other grounds and for such other reasons as may to this Honorable Court seem just and equitable and reasonable, and as may by this Honorable Court be found to exist.

Plaintiff further prays that, pending a trial and hearing of this suit upon its merits, a temporary injunction issue restraining and enjoining the defendants, individually and as members of the Iowa State Board of Assessment and Review, and all persons acting by, through or under them or under the color of their offices, from doing any and each of the following acts:

(a) Making or entering any finding or order that plaintiff has failed to comply with the purported requirements of the order of said State Board of Assessment and Review dated March 30, 1938.

(b) Making any finding that plaintiff has failed to comply with the provisions of the Iowa Use Tax Law.

[fol. 22] (c) Revoking or canceling any sales permit issued to plaintiff covering the operation of its retail stores within the State of Iowa.

(d) Certifying or transmitting to the Secretary of State of the State of Iowa any order or finding with respect to plaintiff's alleged failure to comply with the laws of Iowa with respect to the collection of the so-called "Use Tax", or making any request upon the Secretary of State for the revocation of plaintiff's license to do business within said State as a non-resident corporation, and

(e) From taking any action for the enforcement of the so-called "order" of the Iowa State Board of Assessment and Review dated March 30, 1938, or disturbing the property or position of plaintiff with respect to its business in the State of Iowa as the result of any failure or refusal on the part of plaintiff to comply with the provisions of the so-called "Iowa Use Tax Act", as construed and applied by the defendants.

Plaintiff further prays that upon final hearing upon the merits, the temporary injunction herein prayed be made permanent and perpetual, and that defendants be permanently restrained and enjoined from performing each, all and any of said acts, and plaintiff further prays that it have such relief as it may show itself entitled to receive in equity, and that it have judgment against the defendants individually, and in their capacities as Chairman and members of the Iowa State Board of Assessment and review, for its costs and disbursements herein as taxed by the Clerk.

[fol. 23] *Duly sworn to by E. B. Shapiro. Jurat omitted in printing.*

Exhibits Attached to Said Petition

EXHIBIT "A"

Pamphlet copy of Senate File 317 Acts of the 47th General Assembly entitled Personal Property "Use Tax" Act.

EXHIBIT "B"

Filed March 30, 1938

State Board of Assessment and Review

Resolution and Order of the Iowa State Board of Assessment and Review

* * * * * * *

At a meeting of the Iowa State Board of Assessment and Review held this 30th day of March, 1938, the matter of Sears-Roebuck & Company came before the Board for consideration in regard to the Use Tax Law. On motion of C. F. Green, seconded by D. L. Murrow, the following Resolution and Order was adopted, all members of the Board voting aye:

[fol. 24] Whereas, Sears-Roebuck & Company is a corporation organized under the laws of the State of New York for the purpose of engaging in the retail sale of wares and miscellaneous articles of merchandise; and

Whereas, Sears-Roebuck & Company did on or about the 2nd day of March, 1928, duly make application to the Secretary of State for a permit to transact business in the State of Iowa and pursuant thereto received a permit authorizing it to conduct and carry on its business in the State of Iowa; and

Whereas, Sears-Roebuck & Company has heretofore made application for and received a permit to transact business as a retailer with the State of Iowa and by virtue of the foregoing maintains within the State of Iowa approximately 13 retail establishments or places of business and is a retailer within the purview of subdivisions 5 and 6 of Section 1 of Chapter 198 of the Laws of the 47th General Assembly; and

Whereas, Sears-Roebuck & Company issues, distributes and widely circulates in Iowa its catalog wherein it describes and pictures merchandise which is obtainable at its various retail establishments within the State of Iowa or at retail establishments maintained by other retailers in the State of Iowa and solicits the purchase of any of the items so described in its catalog through mail orders sent direct to its home office in Chicago, Illinois, thereto to be accepted, filled and shipped; and

Whereas, one or more of said catalogs are also kept at each of the said retail stores maintained by Sears-Roebuck

& Company within the State of Iowa; and whereas citizens and residents of the State of Iowa who come to any of said stores of Sears-Roebuck & Company located in the State of Iowa are assisted in selecting from the mail order catalogs there kept and displayed any of the articles of merchandise [fol. 25] listed therein and are assisted in filling out order blanks for said merchandise to be mailed to the Chicago, Illinois, branch of said company by either the purchaser or the assisting retail store; and

Whereas, it is intended, and as a matter of fact, citizens and residents of Iowa are thereby induced and encouraged to view at the retail establishments maintained by Sears-Roebuck & Company items of merchandise that they desire to purchase and then to mail or have their orders mailed for said merchandise to Sears-Roebuck & Company's Chicago, Illinois, office to be shipped direct to said purchaser by mail, freight, or express and thus avoid the 2% sales tax or use tax which said purchaser otherwise would have had to pay if he had purchased said item in Iowa, or from some other retailer maintaining a store in Iowa, or had taken said item from the stock of merchandise kept at one of the retail establishments maintained by Sears-Roebuck & Company in the State of Iowa; and

Whereas, Sears-Roebuck & Company has failed, neglected, and refused to comply with the provisions of Chapter 198 of the Acts of the 47th General Assembly in the following particulars, to-wit:

(a) By refusing and failing to comply with the mandatory provision of section 8 of the Act, which requires every retailer maintaining a place of business in the State of Iowa and making sales of tangible personal property for use in the State of Iowa to collect the tax imposed by the Act from the purchaser at the time of making the sale, whether said sale was made within or without the State of Iowa.

(b) By neglecting, failing, and refusing to file with the Board returns showing the sales of any or all tangible personal property sold by Sears-Roebuck & Company during [fol. 26] the preceding quarterly period for use within the State of Iowa, or to make any remittance of the amount of such tax which they are, by Section 12 of the Act, required to collect; and

Whereas, it is a matter of common knowledge that it is impossible from an enforcement and administrative stand-

point for the State of Iowa to collect the use tax or the sales tax from the purchaser unless the retailer, acting as the designated agent of the state collects said tax and remits the same to the State; and

Whereas, Sears-Roebuck & Company is given equal protection of its property located within the State of Iowa and is equally offered all of the facilities enjoined by any other retailer in the State of Iowa; and

Whereas, Sears-Roebuck & Company by its refusal to comply with the provisions of the Act, as above specified, seeks to and does unfairly compete with all other retail dealers in the State of Iowa who comply with the requirements of the sales tax act and the use tax act and who collect said sales and use tax as by law required; and

Whereas, Sears-Roebuck & Company is engaged in an unfair trade practice by using the branch retail establishments it maintains in the State of Iowa and the retail establishments it maintains outside of the State of Iowa as a means of circumventing the sales tax act of Iowa and as a means of offering its Iowa customers a 2% differential on all purchases made by said Iowa customers from it over like purchases said customers might make from other Iowa retailers; and

Whereas, Sears-Roebuck & Company by adopting the aforesaid practices and refusing to perform its duties with reference to the use tax is inducing citizens of this State to evade the laws of the State of Iowa to the detriment of [fol. 27] the public revenue and to the unfair advantage of law abiding competitors.

Now, Therefore, Be It Resolved by the Iowa State Board of Assessment and Review pursuant to the powers vested in it by law, and it is hereby Ordered as follows:

1. That Sears-Roebuck & Company comply with the mandatory provisions of Section 8 of Chapter 198 of the acts of the 47th General Assembly, known as the Use Tax Act, by collecting from its Iowa purchasers the tax required on all sales of tangible personal property sold by it to said purchaser for use in the State of Iowa.

2. That Sears-Roebuck & Company file with the Iowa Board of Assessment and Review within twelve days from the date of the service of this order all quarterly reports re-

quired by the provisions of the Use Tax Act, Chapter 198 of the Laws of the 47th General Assembly and not heretofore filed.

3. That Sears-Roebuck & Company pay to the Iowa Board of Assessment and Review within twelve days from the date of the service of this order all use tax due the State of Iowa as shown by said quarterly reports and as required by the provisions of Chapter 198 of the Laws of the 47th General Assembly and all penalties and interest due thereon as required by Section 17 of said Act.

4. That Sears-Roebuck & Company make available at Des Moines, Iowa, within twelve days from the date of the service of this order, all of its books, papers, and records relating to all sales of tangible personal property made by it beginning with the first day of April, 1937, to Iowa customers for use or enjoyment within the State of Iowa for such examination and audit as the Iowa State Board of Assessment and Review shall deem it advisable to make.

It is further resolved and ordered that on the 19th day of April, 1938, at 9:30 A. M. a hearing will be held by the [fol. 28] Iowa State Board of Assessment and Review at its office in Des Moines, Iowa, to determine whether or not the above and foregoing order and all portions thereof have been complied with at which time and place you, Sears-Roebuck & Company, may be present and represented by counsel, if you so desire.

It is further resolved and ordered that if at said hearing the Iowa State Board of Assessment and Review shall find that you have wilfully failed to comply with the requirements of the foregoing order, then the sales permit heretofore issued to you for the operation of your retail establishments in the State of Iowa will be cancelled and an order shall be entered finding that you have failed to comply with the specific provisions of the Use Tax Act and the orders of the Iowa State Board of Assessment and Review in connection therewith, and a copy of said order shall be transmitted to the Secretary of State with the request that your permit to do business within the State of Iowa shall be revoked.

It is further resolved and ordered that at the hearing to be held at the time and place above indicated, you may

appear and show cause, if any you have, why the orders above referred to or any of them should not be made.

Signed this 30th day of April, 1938.

Iowa State Board of Assessment and Review, (Signed) by Louis E. Roddewig, Chairman, (Signed) D. L. Murrow, Member, (Signed) C. F. Green, Member.

EXHIBIT "C"

Notice

To Sears-Roebuck & Company:

You are hereby notified that on the 30th day of March, 1938, the Iowa State Board of Assessment and Review pur- [fol. 29] suant to the powers vested in it by law of the State of Iowa did make and enter the Resolution and Order hereto attached marked Exhibit "A" and hereby made a part of this Notice.

You are further notified that in accordance with the Resolution and Order hereto attached the hearing ordered in said Resolution and Order will be held on the 19th day of April, 1938, at 9:30 A. M. at the office of the Iowa State Board of Assessment and Review at the Des Moines Building, Des Moines, Iowa, to determine whether or not you have complied with the said order.

You are further notified that if at said hearing the Iowa State Board of Assessment and Review shall find that you have willfully failed to comply with the requirements of the Resolution and Order thereto attached and marked Exhibit "A", then the sales permit heretofore issued to you for the operation of your retail establishments in the State of Iowa will be cancelled and an order shall be entered finding that you have failed to comply with the provisions of the Use Tax Act and the orders of the Iowa State Board of Assessment and Review in connection therewith and a copy of said order shall be transmitted to the Secretary of State with the request that your permit to do business within the State of Iowa shall be revoked.

You are further notified that at the hearing to be held at the time and place above specified you may appear and show cause, if any you have, why the orders contained in

the Resolution and Order attached thereto or the orders above referred to, or any of them, should not be made and enforced.

You will govern yourselves accordingly.

Iowa State Board of Assessment and Review,
(Signed) Louis E. Roddewig, Chairman.

[fol. 30] State of Iowa,
Polk County, ss:

I, H. W. Hicks, being first duly sworn on oath state that on the 30th day of March, 1938, I served the within notice to which was attached a true and correct copy of the Resolution and Order of the Iowa State Board of Assessment and Review dated the 30th day of March, 1938, and marked Exhibit "A" upon Sears-Roebuck & Company by delivering a true and correct copy of said Notice and Resolution and Order attached thereto and offering to read the original, which reading was waived, to E. R. Shapiro, who is the manager of the Des Moines retail branch maintained by Sears-Roebuck & Company, and who is an agent in this State engaged in the transaction of Sears-Roebuck & Company's business.

(Signed) H. W. Hicks.

Subscribed and sworn to before me, a Notary Public in and for Polk County, Iowa, this 30th day of March, 1938. (Signed) Elsie L. Dichrooth, Notary Public in and for Polk County, Iowa. (Seal.)

Exhibit "D"

Copy of Sections 8420 to 8432, inclusive, Chapter 386 Code of Iowa 1935.

Exhibit "E"

Copy of Section 11, Chapter 196, Acts of the 47th General Assembly.

EXHIBIT "F"

Copy of Section 16, Sub-paragraph 2, Chapter 196, Acts of the 47th General Assembly.

[fol. 31] On the 13th day of October, 1938, the Court entered the following order:

ORDER FOR ALLOWANCE OF TEMPORARY INJUNCTION

On this 13th day of October, 1938, the above entitled cause comes on for hearing before the undersigned on the application of the plaintiff for the allowance of a temporary injunction, the plaintiff appearing by Gamble, Read, Howland & Rosenfield, its attorneys, and the defendants appearing by John H. Mitchell, Attorney General of Iowa, and Charles W. Wilson and Charles E. Bookin, Assistant Attorney Generals.

Whereupon the attorneys for the plaintiff presented to the court the verified petition of the plaintiff on file, and moved for the immediate allowance of a temporary injunction in accordance with the prayer of said petition.

And after having examined said petition and heard the statements and arguments of counsel for the respective parties, the Court Finds that it has jurisdiction of the parties and of the subject matter of this cause and that an order for the allowance of a temporary injunction should issue as prayed in plaintiff's petition.

Therefore, it is Ordered and Adjudged: That the defendants, Louis E. Roddewig, as Chairman of the Iowa State Board of Assessment and Review, and individually, and D. L. Murrow and C. Frank Green, as members of the Iowa State Board of Assessment and Review, and individually, and their agents, servants and employes and all other persons acting through or under their authority or the authority of their offices, be temporarily enjoined and restrained, and until the further order of the Court, from doing any and each of the following acts:

[fol. 32] (a) Making or entering any finding or order that plaintiff has failed to comply with the purported requirements of the order of said State Board of Assessment and Review dated March 30, 1938;

(b) Making any finding that plaintiff has failed to comply with the provisions of the Iowa Use Tax Law;

(c) Revoking or canceling any sales permit issued to plaintiff covering the operation of its retail stores within the State of Iowa.

(d) Certifying or transmitting to the Secretary of State of the State of Iowa any order or finding with respect to plaintiff's alleged failure to comply with the laws of Iowa with respect to the collection of the so-called "Use Tax", or making any request upon the Secretary of State for the revocation of plaintiff's license to do business within said State as a non-resident corporation; and

(e) Taking any action for the enforcement of the so-called "order" of the Iowa State Board of Assessment and Review dated March 30, 1938, or disturbing the property or position of plaintiff with re-pect to its business in the State of Iowa as the result of any failure or refusal on the part of plaintiff to comply with the provisions of the so-called "Iowa Use Tax Act", as construed and applied by the defendants;

this temporary injunction to be effective and the writ of injunction to issue upon the filing of a bond, as provided by law, in the principal sum of twenty thousand dollars ($20,000.00) with sureties to be approved by the Clerk of this Court, and conditioned that the plaintiff will pay all damages that may be adjudged against it by reason of the issuance of such temporary injunction.

[fol. 33] Further Ordered that upon the filing of such bond and the approval of the surety or sureties thereon by said Clerk a writ of injunction directed to the defendants in their individual and official capacities shall issue out of the office of the Clerk of this Court as provided by law and this order.

Dated this 13th day of October, 1938.

(Signed) John J. Halloran, Judge.

Writ of Injunction was issued pursuant to the foregoing Order on October 17, 1938.

On December 21, 1938, the defendants filed the following Answer:

ANSWER

Come now the defendants in the above entitled cause and for answer to the plaintiff's petition admit, deny, and states as follows:

1. The defendants admit each and every allegation not hereinafter denied, modified or qualified.

2. The defendants specifically deny that part of paragraph 3 of the petition wherein the plaintiff alleges and avers as follows:

"When it entered the State of Iowa and commenced to transact business therein, and since, and when it expended money in equipping and stocking its stores within said state, and when it obligated itself under said long-term leases, plaintiff relied upon the rights and privileges given and inuring to it by and under said permit or contract, in the light of the statutes and Constitutions of the State of Iowa and of the United States."

[fol. 34] and defendants state that the plaintiff in originally entering the State of Iowa did so with full knowledge that it would be subject to all proper laws and regulations which might thereafter be imposed upon the plaintiff by the Legislature of the State of Iowa. That the plaintiff entered the State of Iowa under a license or permit to do business within the State and that said license or permit was subject to the provisions of Chapter 386 of the Code of Iowa and specifically Section 8432 thereof, which section is set out in Exhibit "D" of the plaintiff's petition and is by reference thereto hereby made a part hereof.

That the plaintiff in making application for a permit to transact business in the State of Iowa signed an application and statement seeking such permission. That the provisions of said application provided that said certificate or permit "when issued, shall be subject to, and subject this company to, all the provisions of the statutes of Iowa relating to corporations for pecuniary profit." Attached hereto marked Exhibits "A" and "B" and hereby made a part hereof by reference thereto are true and correct photostatic copies of the application and statement executed

and filed by the plaintiff with the Secretary of State of the State of Iowa and upon which a permit or certificate authorizing the plaintiff to transact business in the State of Iowa was issued.

That under the provisions of the laws of the State of Iowa and specifically Section 8376, Chapter 384 Code of Iowa 1927 (same Code of Iowa for 1935) the plaintiff at the time of entering the State of Iowa agreed to be bound by the provisions and requirements contained in said section which reads as follows:

"8376. Legislative control.—The articles of incorporation, by-laws, rules and regulations of corporations here-[fol. 35] after organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used, or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good."

That said license to do business within the State of Iowa issued to the plaintiff did not then and does not now constitute a contract with the State of Iowa but is simply a license or permit issued to the plaintiff authorizing it to do business within the State of Iowa subject, however, to all of the provisions of the statutes of Iowa then or thereafter made applicable to domestic corporations for pecuniary profit organized under the laws of the State of Iowa and also subject to the liabilities, restrictions or duties which were or thereafter might be imposed upon domestic corporations of like character. That the Iowa Use Tax Act, Exhibit "A" of the petition imposes the same liabilities, restrictions and duties upon domestic corporations of like character as are imposed by it upon the plaintiff. That no rights or privileges were ever given to or conferred upon plaintiff by virtue of the license or permit issued to it authorizing it to transact business within the State of Iowa other than that it might enter the State of Iowa and transact business therein, subject however to all then existing or thereafter validly enacted statutes of the State of Iowa.

3. That as to that portion of paragraph 4 of the petition wherein the plaintiff alleges and avers that it has collected

[fol. 36] and paid to the State of Iowa use tax on all orders accepted by it at its retail establishments within the State and filled by it from outside the State, the defendants state, that said sum of $7,853.02, which purportedly represents the use tax due upon such sales and upon merchandise purchased by the plaintiff for use within the state from the period of April 16, 1937, to March 31, 1938, was paid by the plaintiff on the 4th day of June, 1938. That said payment was made one month after action was instituted in Federal Court and was the first payment made by the plaintiff of the use tax heretofore collected by itself, and which should have heretofore been paid by the plaintiff at the time when the same was due, in accordance with the provisions of the Iowa Use Tax Act.

4. That the defendants have neither knowledge, information, nor belief concerning the truth or correctness of the allegations of paragraph 5 of the petition and therefore deny the allegations and averments contained in said paragraph and ask that the plaintiff be required to give strict proof thereof.

Further answering said paragraph 5 the defendants state that the quotation of price, if any, designated in the plaintiff's catalog as F.O.B. a specified point is merely price fixing and not an indication of the source or place of shipment. That the plaintiff is not required to ship said merchandise from without the State of Iowa, but is free to fill said orders from its retail establishments within the State of Iowa. That the purpose of Sears, Roebuck & Company in refusing to comply with the provisions of the Use Tax Act is to employ its branch retail establishments within the State of Iowa and its retail establishments without the State of Iowa as a means of attempting to circumvent the Sales Tax Act and Use Tax Act of Iowa and as a means of offering its Iowa customers a two per cent differential on all [fol. 37] purchases made by said Iowa customers from it over like purchases said customers might make from other Iowa retailers who do comply with the Iowa Retail Sales Tax Act and the Iowa Use Tax Act.

5. That the defendants have neither knowledge, information nor belief concerning the truth or correctness of paragraph 6 of the petition and therefore deny the allegations and averments contained in said paragraph.

6. By way of answer to paragraph 7 of the petition the defendants admit that certain mail order sales made by the plaintiff constitute sales in interstate commerce but the defendants specifically deny that the Iowa Use Tax Law in any way burdens or regulates such sales or requires the plaintiff to obtain a license to engage in such sales.

7. The defendants specifically deny that part of paragraph 8 of the petition reading as follows:

"By the provisions of Section 8 of said Use Tax Act, every retailer maintaining a place of business within the State and making sale of tangible personal property for use within the State where such sales are not exempted under the provisions of Section 3 thereof, nor collectible under the provisions of Section 6 thereof, is required at the time of making such sales 'whether within or without the State', to collect the tax imposed by the Act from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the Iowa State Board of Assessment and Review."

and by way of answer to said allegations of the petition state that the provisions of Section 8 of Chapter 198 of the Acts of the Forty-seventh General Assembly of the State of Iowa, familiarly known as the "Use Tax Act" with refer- [fol. 38] ence to the time of collecting any tax imposed thereby are merely directory and not mandatory; that in accordance with the canons of statutory construction its language is susceptible of such interpretation without contravening the prohibition of the Federal organic law, and has been and is so interpreted by the defendants as a matter of administrative practice.

8. The defendants have neither knowledge, information, nor belief concerning the truth or correctness of the allegations contained in paragraph 8 at page 9 of the petition, reading as follows:

"But plaintiff has never collected nor paid the so-called use tax upon its mail order sales made from its Chicago, Illinois, store or other stores or branch warehouses or factories located outside the State of Iowa, for shipment to persons located within the State of Iowa pursuant to orders so sent by such persons to such stores or warehouses or factories, outside the State of Iowa."

and therefore deny the same and ask that the court require strict proof from the plaintiff concerning the same.

9. The defendants have neither knowledge, information, nor belief concerning the truth or correctness of the allegations contained in paragraph 9 of the petition and therefore deny the same and ask that the court require strict proof from the plaintiff concerning the same.

10. The defendants specifically deny the allegations and averments of paragraph 10 of the petition and state that they have never construed said statute as authorizing and empowering them to require plaintiff at the time of making sales to charge and collect from its mail order customers located within the State of Iowa the Iowa Use Tax. The [fol. 39] defendants aver and state that they have at all times construed that portion of Section 8 of the Iowa Use Tax Act wherein it is provided that every retailer maintaining a place of business in this State and making sales of tangible personal property for use in this State shall at the time of making such sales collect the tax imposed by this Act as being purely directory as to the time when the said tax shall be collected. That the defendants have at all times construed the Act as requiring the collection of the tax by the retailer after the tangible personal property has come to rest within the State of Iowa and has been put in use within the State of Iowa by the purchaser thereof. That the defendants have never attempted to apply the Iowa Use Tax as a burden or restriction upon the operation of interstate commerce, but have construed said tax to apply solely to the privilege of use after the commerce is at an end.

The defendants further state that the requirement that the plaintiff collect the tax is not an attempt to regulate the conduct of its business without the boundaries of the State of Iowa and said tax does not in any manner impose an unconstitutional burden either upon interstate commerce or upon the plaintiff by virtue of the fact that the plaintiff is required to collect said tax.

11. The defendants specifically deny that portion of the allegations and averments of paragraph 11 reading as follows:

"Plaintiff alleges that if said hearing before the Iowa State Board of Assessment and Review is held, that said Board will make a finding that petitioner has violated the

provisions of the Use Tax Act by failing and refusing to collect upon its mail order sales to persons within the State of Iowa the so-called 'Iowa Use Tax' amounting to two per [fol. 40] cent thereof, and because of said alleged violation defendants will revoke the plaintiff's license as a retailer under the Iowa Sales Tax Act, and will certify to the Secretary of State of the State of Iowa a copy of its order finding that plaintiff has failed to comply with the order of said Board, and that by the provisions of Section 21 of the Use Tax Act, upon receipt of such certification it is made the mandatory duty of the Secretary of State of the State of Iowa to revoke plaintiff's license and qualifications to do business as a foreign corporation within the State of Iowa."

and state that said order, Exhibit "B" attached to the petition and the Iowa Use Tax Act gave to the plaintiff a complete administrative remedy and an opportunity to show cause why the orders contained in said Exhibit "B" should not be made. That plaintiff could have appeared at the time and place designated in said order and urged every defense that it here urges and the same would have been considered and then and only then would the Board of Assessment and Review have decided upon its course of procedure relative to the action to be taken.

12. The defendants specifically deny that portion of paragraph 11 beginning on page 13 of the petition and reading as follows:

"That the said license or permit so granted to plaintiff to transact business within the State of Iowa as a foreign corporation under the circumstances hereinbefore alleged, and the said several permits so granted to plaintiff to conduct its retail merchandising business in each of its twelve stores located within the State of Iowa under the circumstances hereinbefore alleged, constitute property rights and [fol. 41] valid and subsisting contracts between the said State of Iowa and plaintiff; and the revocation of such permit to transact business in the State of Iowa as a foreign corporation and such permits to conduct a retail merchandise business in its said several stores in Iowa, will result in the deprivation by the State of Iowa of the property of plaintiff without due process of law, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and will result in the

impairment of the obligation of said contracts, contrary to the provisions of Section 10 of Article I, of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts."

and the defendants state and aver that there never was a contract between the State of Iowa and the plaintiff corporation. That no charter was ever granted to the plaintiff by the State of Iowa, but that upon application for a permit to do business within the State of Iowa, as shown by Exhibits "A" and "B" hereto attached, a license was issued to the plaintiff which license permitted it to do business within the State of Iowa, subject, however, to all the statutes which then or might thereafter relate to domestic corporations for pecuniary profit or which might thereafter be imposed by the Legislature.

13. The defendants have neither knowledge, information, nor belief concerning the truth or correctness of the allegations contained in paragraph 12 of the petition and therefore deny the same and ask that the court require strict proof from the plaintiff concerning the same.

14. The defendants specifically deny all of the averments, allegations and conclusions of law of paragraph 13 of the petition and state that the defendants' interpretation and [fol. 42] construction of the Iowa Tax Act is wholly in accordance with the provisions of said Act and that neither the construction nor interpretation adopted, nor the Act, nor any provisions thereof, contravene any provisions of the United States Constitution, or any of the amendments thereto.

15. The defendants specifically deny paragraphs 14 and 15 of the petition and by way of answer the defendants state and aver that the plaintiff has an adequate, plain and speedy administrative remedy, and also a plain, speedy, and adequate remedy in the law courts of the State of Iowa. That the plaintiff has refused to avail itself of the procedure and machinery provided by the statutes of the State of Iowa and by the law courts of the State of Iowa, or to appear before the Iowa State Board of Assessment and Review and show cause why the plaintiff should not comply with the provisions of the Iowa Use Tax Act, but instead seeks to invoke the jurisdiction of the equity courts.

16. Further answering, the defendants aver and state that the Iowa Sales Tax Act, Chapter 196 of the Laws of the 47th General Assembly, a true and correct copy of which is hereto attached, marked Exhibit "C" and hereby made a part hereof and the Iowa Use Tax Act must be construed together in determining whether the Iowa Use Tax Act imposes a burden upon interstate commerce. That when so construed together, the defendants state and aver, that it is apparent, that the said Iowa Use Tax is not so measured or conditioned as to hamper the transactions of interstate commerce or discriminate against it, but rather that equality is the theme that runs through all the sections of the said Iowa Use Tax Act.

[fol. 43] Wherefore, the defendants pray the court to deny the relief asked by the plaintiff and to dismiss said petition at plaintiff's costs.

John H. Mitchell, Attorney General of Iowa; Charles Bookin, Special Assistant Attorney General; Charles W. Wilson, Assistant Attorney General, Attorneys for Defendants.

Exhibits Attached to Answer

Exhibit "A"

Application Resolutions and Statements by Foreign Corporation Desiring to Transact Business in the State of Iowa

Name of corporation: Sears, Roebuck and Co.

Postoffice address: 3333 Arthington Street, Chicago, Illinois.

Resolutions and Applications by Directors and Stockholders.

At a meeting of the (Directors or stockholders) Directors of Sears, Roebuck and Co., of Chicago, Illinois, held at Chicago, Illinois, on the 18th day of February, A. D. 1928, the following resolutions were adopted,—including application to the Secretary of State of the State of Iowa for authority to transact business in said state:

[fol. 44] Resolved, that a certified copy of the articles of incorporation of this company be filed with the Secretary of

State of the State of Iowa, with a request that a certificate be issued authorizing this company to transact business in the state of Iowa, it being understood and hereby agreed that the certificate or permit, when issued, shall be subject to, and subject this company to, all the provisions of the statutes of Iowa relating to corporations for pecuniary profit.

Resolved further, That service of process is hereby authorized to be made upon any of the officers or agents of this corporation, acting for or engaging in the transaction of its business within said state.

Resolved further, That two of the principal officers of this company be, and they are hereby authorized and directed to do any and all things necessary to carry into effect the provisions of these resolutions, also to prepare and execute, under oath, a statement showing the total authorized capital of this corporation, its paid-up capital, the total value of its assets and the value of its assets now in use in the state of Iowa; also the estimated total amount to be used in said state during the ensuing year.

R. E. Wind, Chairman of Meeting. Jno. Higgins, Secretary of Meeting.

EXHIBIT "B"

Statement

By two of the principal officers of Sears, Roebuck and Co. Company organized under the laws of the State of New York with principal place of business at 3333 Arthington Street, Chicago, Illinois.

Total authorized capital of above corporation	4,200,000 shares of no par value.
[fol. 45] Total paid-up capital of above corporation	$105,000,000.00
Total value of all assets of the above corporation, including money and property other than money, represented by capital, surplus, undivided profits, bonds, promissory notes, certificates of indebtedness, or other designation; whether carried as money on hand or in bank, real estate or personal property of any description	163,432,129.64

Total value of all property in use or held as investment in the State of Iowa at this time	None
Total value of money and all other property above corporation proposes or expects to make use of in the State of Iowa during the ensuing year	10,000.00

We, the undersigned (*) President, (*) and Secretary respectively, of Sears, Roebuck and Co., of Chicago, Illinois, hereby depose and say, each for himself, that the facts above set forth are true as we verily believe.

Witness our hands this 18th day of February, A. D. 1928.

R. E. Wind, President. Jno. Higgins, Secretary.

[fol. 46] State of Illinois,
Cook County, ss:

Subscribed in my presence and sworn to before me by the above named parties this 18th day of February, A. D. 1928.

C. L. Schenk, Notary Public in and for Cook County, and State of Illinois. My commission expires Nov. 29th, 1929. (L. S.)

Exhibit "C"

Copy of Senate File 316, Acts of the 47th General Assembly of the State of Iowa, entitled "Retail Sales Tax Act."

Evidence of Plaintiff, Sears, Roebuck & Company

Mr. Gamble: I would like to read into the record, largely for the purpose of preserving it, a stipulation which the parties have entered into:

Stipulation re Submission, etc.

"The parties to this cause, through their respective counsel, do stipulate and agree as follows:

"(a) That this cause may be submitted upon the petition of plaintiff and the answer of the defendants, and

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(* Designate the official position—President, Vice President, Secretary, Treasurer or Manager.)

"(b) That certain stipulation of facts this day entered into between the parties and filed as a part of the record, and

"(c) That the testimony of Harry A. Welsher, Theodore V. Houser and Charles E. Kallal for the plaintiff, and Jack T. Tincher for the defendants, given on the trial of the case of Sears, Roebuck & Company, complainant, vs. Louis E. Roddewig, as Chairman of the Iowa State Board of Assess-
[fol. 47] ment and Review, and individually, and D. L. Murrow and C. Frank Green, as Members of the Iowa State Board of Assessment and Review, and individually, defendants, No. 4646, in Equity, in the District Court of the United States, Southern District of Iowa, Central Division, as transcribed by Gordon L. Elliott, the shorthand reporter, shall be considered as the depositions of said witnesses and as depositions taken in this case which may be read in evidence, in whole or in part, by either party, and received subject to such objections as appear in said transcript to each of the questions and answers therein set out.

"(d) The photostatic reproductions of Exhibits '1' and '2' introduced by the defendants in said cause tried in the United States District Court for the Southern District of Iowa, Central Division, may be offered in evidence in this cause subject to such objections as may be made as to relevancy or materiality.

"Dated this 12th day of December, 1938."

In the stipulation, your Honor, a stipulation of facts this day entered into, is referred to, and also for the purpose of preserving that stipulation in the record, I desire to read it:

STIPULATION OF FACTS

"For the purpose of expediting the trial of the above entitled cause by eliminating the necessity of producing formal proof of the existence of certain facts, the parties to this cause, through their respective counsel, do stipulate and agree as follows:

"(1) That plaintiff in the ordinary conduct of the course of its business makes sales of tangible personal property to residents of or persons within the State of Iowa by one or more of the following described methods, to-wit:

[fol. 48] "Type 1. Direct Sales. Sales made in its retail stores located within the State of Iowa of such property out

of the stock of said store, payment therefor being made to said store by the purchaser, and such sales being subject to the Iowa Sales Tax.

"Type 2. Special Order—Ship Direct Sales. This method of sale is followed where a purchaser orders from one of plaintiff's retail stores in Iowa tangible personal property which is not carried by the store in stock, but which is carried by one of plaintiff's mail order establishments located outside of the State of Iowa. In this type of sale the order for the purchase is given to the local store, and payment therefor, including transportation charges from the shipping point, is made to the local store. The local store then orders shipment of the goods purchased to be made directly to the purchaser from one of plaintiff's mail order establishments; and the mail order establishment fills the order, charging the local store with the cost price of the goods, plus an amount to cover overhead expense in handling and shipping, plus the actual transportation charges. The purchase price paid to and received by the local store is retained by it and included in the volume of its gross sales.

"Type 3. Mail Order Sales. In this type of sale the purchaser, a resident or person in Iowa, after preparing his order or having it prepared for him, sends to one of plaintiff's mail order establishments located outside of Iowa a written order for the purchase and delivery to him in Iowa of one or more items of tangible personal property listed and priced in plaintiff's mail order catalogs, the order being accompanies by the remittance of the purchase price plus transportation charges, and the means of transportation [fol. 49] being customarily specified by the purchaser. The order is accepted or rejected, as the case may be, at the mail order establishment of plaintiff which received the order; and if the order is accepted it is filled by the direct shipment of the property purchased from said mail order establishment to the purchaser in the State of Iowa, delivery being accomplished through the United States mails or some common carrier of goods, such as specified by the purchaser.

"(2) For the purpose of this case, it is stipulated as a fact that plaintiff has failed and refused to collect from the purchaser to whom mail order sales as hereinbefore defined have been or are being made, the so-called use tax imposed by the Use Tax Act of the State of Iowa.

"And for the purposes of this case, plaintiff now concedes and stipulates as a fact that it is obligated to collect from the purchaser and remit to the State of Iowa either the sales tax or the use tax imposed on all types of sales made by it to residents of or persons within the State of Iowa, excepting on mail order sales hereinbefore defined as Type 3.

"(3) For the purposes of this case, it is further stipulated as a fact that: On or about the 2nd day of June, 1938, plaintiff made to the Iowa State Board of Assessment and Review so-called Retailer's Use Tax Returns for the quarterly periods ending June 30, 1937, September 30, 1937, December 31, 1937, and March 31, 1938; and at the same time paid under protest to said Board the sum of $7,853.02. That said returns purported to show, and that the sum of money thus paid purported to be, the correct amount of the use tax exacted under the terms and provisions of the Iowa [fol. 50] Use Tax Act for the periods mentioned in said returns, for sales of tangible personal property identified as Type 2 in the preceding paragraph of this Stipulation, and also the use tax exacted on account of tangible personal property purchased by plaintiff outside of the State of Iowa but used by plaintiff within the State of Iowa and subject to the said Iowa Use Tax Act. That the said returns thus filed and the payment of money thus made by plaintiff were provisionally accepted by the Iowa State Board of Assessment and Review as correct, but as subject to final adjustment in the usual course of the administration of the said Iowa Use Tax Act.

"Either party to this cause may file this stipulation as a part of the record and the same, if filed, shall constitute part of the record and be considered as proof of the facts therein stipulated. The opposite party shall have the privilege of objecting, at the time that the said stipulation is filed, to any of the facts stipulated on the grounds that the same are irrelevant or immaterial.

"Dated this 12th day of December, 1938."

Mr. Bookin, attorney for defendants, offered in evidence Exhibits "1" and "2". By stipulation the transcript of the shorthand notes of the evidence taken by Gordon L. Elliott, shorthand reporter and referred to in the stipulation was offered in evidence by both parties as Exhibit "A", the plaintiff reading into the evidence the testimony of the witnesses, Harry A. Welsher, Theodore V. Houser

and Charles E. Kallal, and the defendant reading into the evidence the testimony of Jack T. Tincher. The offers included the cross examination of said witnesses all as shown by the transcript.

[fol. 51] **Defendants' Exhibits**

Exhibit "1"

Application Resolutions and Statements By Foreign Corporation Desiring to Transact Business in the State of Iowa

Name of corporation Sears, Roebuck and Co.

Postoffice address, 3333 Arthington Street, Chicago, Illinois.

Resolutions and Applications by Directors and Stockholders.

At a meeting of the (Directors or Stockholders) Directors of Sears, Roebuck and Co. of Chicago, Illinois, held at Chicago, Illinois, on the 18th day of February, A. D. 1928, the following resolutions were adopted,—including application to the Secretary of State of the State of Iowa for authority to transact business in said state.

Resolved, that a certified copy of the articles of incorporation of this company be filed with the Secretary of State of the State of Iowa, with a request that a certificate be issued, authorizing this company to transact business in the state of Iowa, it being understood and hereby agreed that the certificate or permit, when issued, shall be subject to, and subject this company to, all the provisions of the statutes of Iowa relating to corporations for pecuniary profit.

Resolved further, That service of process is hereby authorized to be made upon any of the officers or agents of this corporation, acting for or engaging in the transaction of its business within said state.

[fol. 52] Resolved further, That two of the principal officers of this company be, and they are hereby authorized and directed to do any and all things necessary to carry into effect the provisions of these resolutions, also to prepare and execute, under oath, a statement showing the total authorized capital of this corporation, its paid-up capital, the total value of its assets and the value of its assets now in use in the state of Iowa; also the estimated total amount to be used in said state during the ensuing year.

R. E. Wind, Chairman of Meeting. Jno. Higgins, Secretary of Meeting.

Statement

By two of the principal officers of Sears, Roebuck and Co. Company organized under the laws of the State of New York with principal place of business at 3333 Arthington Street, Chicago, Illinois.

Total authorized capital of above corporation 4,200,000 shares of no part value.	
Total paid-up capital of above corporation	$105,000,000.00
Total value of all assets of the above corporation, including money and property other than money, represented by capital, surplus, undivided profits, bonds, promissory notes, certificates of indebtedness, or other designation; whether carried as money on hand or in bank, real estate or personal property of any description	163,432,129.84
Total value of all property in use or held as investment in the State of Iowa at this time	None
[fol. 53] Total value of money and all other property above corporation proposes or expects to make use of in the State of Iowa during the ensuing year	10,000.00

We, the undersigned (*) President, (*) and Secretary respectively, of Sears, Roebuck and Co., of Chicago, Illinois, hereby depose and say, each for himself, that the facts above set forth are true as we verily believe.

Witness our hands this 18th day of February, A. D. 1928.

R. E. Wind, President. Jno. Higgins, Secretary.

State of Illinois,
Cook County, ss:

Subscribed in my presence and sworn to before me by the above named parties this 18th day of February, A. D. 1928.

C. L. Schenk, Notary Public in and for Cook County and State of Illinois. (L. S.) My commission expires Nov. 29th, 1929.

(*Designate the official position—President, Vice President, Secretary, Treasurer or Manager.)

[fol.54] Exhibit "J"

Part 1

Domestic Corporations Registered Under Section 8 of Iowa Personal Property Use Tax Law for Sales from Out-of-State Institutions for Use in Iowa

Reg. No.	Name and Address	Tax Paid
100013	A. Y. McDonald Mfg. Co., Dubuque, Iowa	No Tax
100021	Beauty Utilities of Iowa, Waterloo, Iowa	$ 189.00
100045	Shotwell-Carver Co. Inc., Des Moines	262.28
100077	Consumers Coal & Supply Co., Dubuque, Iowa	No Tax (Canc.)
100078	L. W. Ramsey Co., Davenport, Iowa	11.49
100079	Clay Equipment Corporation, Cedar Falls, Iowa	No Tax
100080	Oskaloosa Ice Co., Oskaloosa, Iowa	No Tax (Canc.)
100081	Schoitz Engineering Works, Inc., Waterloo, Iowa	No Tax
100082	City Coal Company, Albia, Iowa	No Tax (Canc.)
100083	Electrical Engineering & Const. Co., Des Moines, Iowa	No Tax
100086	Drake Hardware Company, Burlington, Iowa	No Tax
100088	Fullmer Builders Supply Co., Ottumwa, Iowa	No Tax (Canc.)
[fol.55]		
100089	Citizens Service Company, Swea City	No Tax
100095	Farmers Grain Co., Larchwood, Iowa	No Tax
100097	Berry Lumber Co., Onawa, Iowa	No Tax (Canc.)
100098	Automatic Gravel Products Co., Muscatine, Iowa	No Tax
100099	Sibley Cement Company, Sibley, Iowa	83.29
100100	Shell Lumber Company, Sibley, Iowa	.98
100101	Will H. Zaiser Specialty Co., Des Moines, Iowa	No Tax
100102	The Mastercraftsmen, Inc., Des Moines, Iowa	No Tax
100103	Berkowitz Envelope Co. of Iowa, Des Moines, Iowa	1.77
100104	The McGregor Company, Oskaloosa, Iowa	No Tax
100105	General Air Conditioning Corp., Cedar Rapids, Iowa	No Tax
100106	Castone Products Co., Cedar Rapids, Iowa	No Tax
100107	Tribune Publishing Co. Inc., Cedar Rapids, Iowa	No Tax
100108	The Luberger Company, Cedar Rapids, Iowa	No Tax
100109	H. Trenkle Co., Dubuque, Iowa	49.71
100110	Metz Manufacturing Co., Dubuque, Iowa	No Tax
100111	The National Yeast Co. Inc., St. Olaf, Iowa	No Tax

EXHIBIT "2"—Part 1—Continued

Reg. No.	Name and Address	Tax Paid
[fol.56]		
100112	Niemeyers, Hawarden, Iowa	No Tax (Canc.)
100113	Manning McComb Co., Des Moines, Iowa	No Tax (Canc.)
100114	Pure Ice Company, Centerville, Iowa	No Tax
100115	Amana Society, Amana, Iowa	No Tax (Canc.)
100116	Master Ref. Locker Systems, Sioux City, Iowa	No Tax
100117	T. R. Curney Oil Company, Sioux City, Iowa	2.88
100118	The Phillip Bernard Co., Sioux City, Iowa.	1.75
100119	Johnson Biscuit Co., Sioux City, Iowa	No Tax (Canc.)
100121	Lehigh Sewer Pipe & Tile Co., Ft. Dodge, Iowa	24.18
100120	L. O'Harrow Co., Sioux City, Iowa	No Tax (Canc.)
100122	Chas. Naeckel's Sons Co., Davenport, Iowa	No Tax
100123	Sieg-Mason City Co., Mason City, Iowa.	No Tax (Canc.)
100124	Palmer School of Chiropractic, Davenport, Iowa	172.32
100125	U. S. Broom Company, Inc., Davenport, Iowa	No Tax
100126	Coughlin Sales Company, Davenport, Iowa	No Tax
100127	Strieter Motor Company, Davenport, Iowa	No Tax
100128	Red Jacket Manufacturing Co., Davenport, Iowa	No Tax
[fol.57]		
100130	Omaha Standard Body Corp., Council Bluffs, Iowa	3.02
100133	Des Moines Steel Bldg. Co., Des Moines, Iowa	1,100.71
100136	Luana Farmers Coop. Society, Luana, Iowa	No Tax
100137	Uchtorff Weiser Co., Davenport, Iowa	109.81
100138	Florida Fruit Co., Dubuque, Iowa	No Tax (Canc.)
100139	Ben S. Noble Lumber Co., Ida Grove, Iowa	No Tax
100140	Rainbow Oil Co., Dubuque, Iowa	No Tax (Canc.)
100141	Kruber-Morgan Elec. Co., Cedar Rapids, Iowa	No Tax (Canc.)
100142	Star Spark Arrestor Co., Oskaloosa, Iowa.	No Tax (Canc.)
100143	Riverside Fuel Co., Davenport, Iowa	No Tax (Canc.)
100144	Kelling Wilkinson Oil Co., Davenport, Iowa	1.24
100147	Bartles-Shepherd Oil Co., Waterloo, Iowa.	59.49
100153	Johnson Service Company, Des Moines, Iowa	33.99
100161	The Advertising Novelty Co., Newton, Iowa	No Tax

EXHIBIT "2"—Part 1—Continued

Reg. No.	Name and Address	Tax Paid
100297	Grand Recreation Corporation, Des Moines, Iowa	10.19
100298	Des Moines Incubator Co., Des Moines, Iowa	.21
[fol.58]		
100309	The Van Meter Co., Cedar Rapids, Iowa	No Tax
Total Amount of Tax Paid		$2,048.48
Total Number of Retailers		63

Part 2

Foreign Corporations Registered Under Section 9 of Iowa Personal Property Use Tax Law for Collection of Tax on Sales for Use in Iowa

Reg. No.	Name and Address	Tax Paid
100092	Dimock, Gould & Co., Moline, Illinois	$ 239.78
100151	Lewis Mfg. Company, Walpole, Mass.	No Tax (Canc.)
100155	Iron Fireman Corporation, Cleveland, Ohio	No Tax
100230	Farmers Co-op. Oil Co., Canton, S. Dak.	17.75
100231	M. Engebretson, Sioux Falls, S. Dak.	No Tax
100238	The Texas Company, Lawrenceville, Ill.	11.62
100242	Paul Oldenburg Co., Elmore, Minn.	No Tax
100248	Producers Creamery of Moline, Moline, Illinois	228.86
100288	C. A. Dunham Company, Chicago, Illinois	347.59
[fol.59]		
100350	The Gregory Laboratory, White Hall, Ill.	18.95
100356	Ashe Lockhart, Inc., Kansas City, Mo.	1.59
100361	Haver-Glover Laboratories, Kansas City, Mo.	1.00
100368	Lyons Band Instrument Co., Chicago, Ill.	No Tax
100382	Claude Neon Federal Co., Chicago, Ill.	No Tax
Total Amount of Tax Paid		$ 867.14
Total Number of Retailers		14

Part 3

Out of State Firms (not Corporations) Registered for Collection of Tax under Sections of Iowa Personal Property Use Tax Law

Reg. No.	Name and Address	Tax Paid
100055	Associated Sales Distributors, Minn., Minn	$ 31.12
100063	Matthews Shirt Co., Chicago, Ill.	158.15
100292	C. C. Anker, Chicago, Ill.	4.19
100306	Harold Griffith, Livonia, Mo.	2.35 (Canc.)
100311	Manitowoc Knitting Mills, Manitowoc, Wis.	15.09

EXHIBIT 2—Part 3—Continued

Reg. No.	Name and Address	Tax Paid
100312	Edwin C. Barnes & Bros., Chicago, Ill.	No Tax
100352	Cleveland Studio, Omaha, Nebr.	No Tax
[fol.60]		
100377	D. D. Tarpy, Omaha, Nebr.	No Tax
100383	Hand Tooled Leather Co., Rockford, Ill.	No Tax
100388	Quincy Leather Company, Quincy, Ill.	No Tax
Total Amount of Tax Paid		$ 210.00
Total Amount of Retailers		10

Part 4

Mail Order Houses Registered Under Section 8 of Iowa Personal Property Use Tax Law but not Included in Statement for Foreign Corporations Operating Under This Section

Reg. No. 100006
Montgomery Ward & Co.
Chicago, Illinois

B-37	$ 8.38
C-37	116.50
D-37	80.31
A-38	1,339.56
Total	$1,544.75

Reg. No. 100366
Sears, Roebuck & Co.
Chicago, Illinois

B-37	$1,474.48
C-37	1,621.71
D-37	2,602.64
A-38	2,154.19
Total	$7,853.02

[fol.61]

Part 5

Iowa Residents (not Corporations) Registered Under Section 8 of the Iowa Personal Property Use Tax Law for Collection of Tax on Sales for Use in Iowa

Reg. No.	Name and Address	Tax Paid
100001	John M. Dunkerton, Des Moines, Iowa.	$ 52.47
100008	B. & M. Service Co., Des Moines, Iowa.	254.50
100019	Movie Photo Co., Des Moines, Iowa.	12.42
100036	Emory Jones, Des Moines, Iowa.	320.10
100049	Nowlin's Distributing Co., Des Moines, Iowa.	144.43
100066	Iowa Road Blg. Co., Des Moines, Iowa.	1,273.32
100069	Harry Waite, Hawarden, Iowa.	46.73
100152	Mrs. Elsia H. Carle, Muscatine, Iowa.	No Tax
100154	Miss Edith J. Cranston, DeWitt, Iowa.	5.53
100156	H. P. Braun, Des Moines, Iowa.	4.89
100157	V. V. Wonderling, S. Sioux City, Neb.	1.95

Exhibit 2—Part 5—Continued

Reg. No.	Name and Address	Tax Paid
100160	The Vernon Company, Newton, Iowa	No Tax
100162	R. W. Eldridge, Waterloo, Iowa	10.63
100168	Mr. and Mrs. Fred Merritt, Mapleton, Iowa	1.34
100169	W. H. Orr, Clear Lake, Iowa	3.71
[fol.62]		
100172	C. W. Stipp Co., Des Moines, Iowa	No Tax
100173	Miss Katharine Martin, Des Moines, Iowa	2.37
100175	Mrs. Nina B. Sugg, Clinton, Iowa	15.21
100176	Mollie Hird, Dubuque, Iowa	3.85
100177	Zita L. Baker, Cresco, Iowa	4.80
100174	Mrs. G. D. Suter, Des Moines, Iowa	1.85 (Canc.)
100180	Mrs. A. F. McCoy, Lanesboro, Iowa	6.42
100181	Mrs. H. D. Patterson, Nevada, Iowa	6.21
100182	Miss Grace Negus, Bainbeck, Iowa	4.23
100183	Nora Dundore, Perry, Iowa	1.77
100184	Mrs. Verva Bixler, Clarence, Iowa	8.58
100185	Blanche L. Paul, Muscatine, Iowa	17.79
100186	Ruth V. Adams, Marshalltown, Iowa	7.13
100187	Mrs. Henrietta H. Burnham, Griswold, Iowa	2.35
100188	Bertha L. Marsh, Cherokee, Iowa	10.26
100189	Elsie McNiel, Cedar Rapids, Iowa	5.87
100190	Johanah Larsen, Onawa, Iowa	2.60
100191	Mrs. J. L. Stewart, Maquoketa, Iowa	5.14
[fol.63]		
100192	Lillian Huntington Lockwood, Waterloo, Iowa	6.54
100193	Miss Laura M. Pedersen, Des Moines, Iowa	7.90
100195	Mrs. Marie T. Douglass, Cedar Rapids, Iowa	4.84
100196	Mrs. Lela O. Kish, Riverton, Iowa	1.45
100197	Mrs. Curtis Sutton, Anamosa, Iowa	7.68
100198	Belle C. Collett, Ottumwa, Iowa	2.20 (Canc.)
100200	Mrs. Cora H. Hill, Badger, Iowa	3.88
100202	Mrs. Ralph Janssen, Ackley, Iowa	3.65
100203	Anna Fitzgerald, Pocahontas, Iowa	3.18
100204	Estelle E. Claussen, Clinton, Iowa	3.55
100206	Mrs. O. M. Bundy, Cedar Rapids, Iowa	6.05
100207	Mrs. Grace Collins, Monmouth, Iowa	4.36 (Canc.)
100208	Mrs. Minnie Meier, Waukon, Iowa	2.19
100209	Mrs. Rose Severson, Davenport, Iowa	No Tax
100210	Mrs. Pearl Edwards, Marengo, Iowa	14.67
100211	Margaret Shanewise, Waverly, Iowa	6.51
100212	Farna E. Leeper, Newell, Iowa	5.66
100214	Mrs. Hilda Ruser, Bennett, Iowa	2.01
[fol.64]		
100216	Mrs. Bess Steinmetz, Muscatine, Iowa	4.42

Exhibit 2—Part 5—Continued

Reg. No.	Name and Address	Tax Paid
100217	Mrs. A. Lola Johnson, Waterloo, Iowa..	2.12 (Canc.)
100218	Thomas N. Naudain, Sioux City, Iowa..	18.20
100219	Mrs. E. L. Rhodes, Sioux City, Iowa....	9.32
100221	Miss Amanda Looft, Swea City, Iowa...	7.17
100222	Mrs. Angie B. Noble, Charles City, Iowa	35.60
100223	Mrs. Ida C. Bell, Sioux City, Iowa.....	13.86
100224	Miss Lena M. Johnson, Sioux City, Iowa	4.50
100226	Mrs. Ruth M. Edwards, Marengo, Iowa	17.75
100227	Mrs. Ruth Rice, Cedar Rapids, Iowa..	11.00
100229	Mrs. Lee McNamee, Geneva, Iowa....	2.37
100232	Mrs. Geo. S. Klahm, Davenport, Iowa.	3.45
100233	Miss Minnie Harrison, Waterloo, Iowa.	6.43
100234	Mrs. Teresa Peterson, Davenport, Iowa	16.27
100237	Kunie & Nelson, Malvern, Iowa.....	No Tax (Canc.)
100238	Hazel A. Clyde, Osage, Iowa.....	10.13
100244	Mrs. Bess Adams, Iowa City, Iowa....	6.34
[fol.65]		
100245	George E. Krepelka, Osage, Iowa.....	9.79
100246	C. A. Kay, Centerville, Iowa.....	.12
100247	Luella Wall, Des Moines, Iowa.....	13.60
100251	Mrs. Anna Bentrude, Waterloo, Iowa..	2.52
100253	Daisy Haney, Keosauqua, Iowa.....	1.71
100254	A. B. Carstensen, M. D., Linn Grove, Iowa.....	1.89
100255	Mary Ellen O'Mara, Fort Dodge, Iowa	2.79 (Canc.)
100256	Mrs. W. P. Donald, Ames, Iowa.....	No Tax
100257	Mrs. Nelle C. Culver, Anthon, Iowa...	10.97
100258	Mrs. Clara Ford, Burlington, Iowa....	11.82
100259	Mrs. Gertrude E. Dow, Davenport, Iowa.....	7.68
100260	Margaret Bower, Marble Rock, Iowa..	7.38
100261	Mrs. Alice D. French, Des Moines, Iowa	11.64
100262	Marion M. Kemp, Muscatine, Iowa...	No Tax
100264	Mrs. Viola M. Haddad, West Union, Iowa.....	5.34
100265	Mrs. Clarence Van Wechel, Orange City, Iowa.....	3.95
100266	Mrs. R. C. Mahaffa, Des Moines, Iowa.	No Tax
100267	C. A Merritt, Clarence, Iowa.....	8.21
[fol.66]		
100268	Nellie M. Du Mond & Margaret, Waterloo, Iowa.....	29.54
100269	D. M. Stewart, Chapin, Iowa.....	No Tax
100271	Mrs. Vera K. Findly, Iowa City, Iowa.	21.67
100272	Mrs. Nettie F. Wood, Council Bluffs, Iowa.....	12.43
100273	Mrs. E. C. Eastin, Ft. Madison, Iowa..	14.24
100274	Mabel Garnsey, Sioux City, Iowa.....	6.02
100276	Mrs. Ethel M. James, Columbus Junction, Iowa.....	No Tax

Exhibit 2—Part 5—Continued

Reg. No.	Name and Address	Tax Paid
100277	Mrs. A. Dennison, Bellevue, Iowa	9.41
100278	Mrs. Helen Piffer, Indianola, Iowa	No Tax
100280	G. E. Offord, Clinton, Iowa	57.65
100283	Mrs. Mary Wilhite, Manning, Iowa	3.57
100284	Mrs. Delsie Berg, Fort Dodge, Iowa	No Tax
100285	Miss Effie Holt, Boone, Iowa	.37
100286	Mrs. Anna Schmidt, Davenport, Iowa	5.10
100287	Mrs. Frank Neely, Monroe, Iowa	5.22
100289	Mrs. Fay Mayo, Des Moines, Iowa	4.19
100290	Mrs. Henry O. Timmerman, Sheffield, Iowa	1.63
[fol.67]		
100291	Mrs. Laura Graham, Davenport, Iowa	1.84
100293	P. A. Graf, Mason City, Iowa	11.47
100295	Mrs. Mabel Kirchgatter, Iowa Falls, Iowa	3.30
100301	Mrs. T. A. Bell, Anita, Iowa	5.39
100303	Mrs. Emma B. Richardson, Washington, Iowa	23.00
100304	Daisy C. Rees, Ottumwa, Iowa	5.83
100308	Mrs. Maude Runkle, Lisbon, Iowa	3.52
100310	Miss Mabel M. Merritt, Ottumwa, Iowa	No Tax
100313	Isabel Hora, Boone, Iowa	.71
100324	Mrs. Jessie Densmore, Mason City, Iowa	5.02
100325	Mrs. T. L. Rogerson, Eagle Grove, Iowa	1.27
100328	Fred Golden, Burlington, Iowa	23.03
100329	Mrs. Sarah T. Schaefer, Fort Dodge, Iowa	No Tax
100330	Mrs. Vae S. Hawker, West Liberty, Iowa	5.11
100344	Wiley Whitehead, Marengo, Iowa	5.85
100351	Mrs. Anna Roach, Mapleton, Iowa	6.01
100362	Anna T. Mueller, Davenport, Iowa	1.71
100364	Mrs. A. J. Preston, Muscatine, Iowa	1.71
[fol.68]		
100367	Mortuary Supply Co., La Porte City, Iowa	No Tax
100369	Mrs. Elda Poppleton, Sioux City, Iowa	1.60
100370	Mrs. Norine Bensmiller, Ottumwa, Iowa	3.14
100373	Mrs. Eleanor T. Severance, Sutherland, Iowa	No Tax
100375	D. B. Tuttle, Decorah, Iowa	No Tax
100378	Miss Gladys Campbell, Mt. Pleasant, Iowa	No Tax
100381	M. A. Bates, Seymour, Iowa	No Tax
100384	Mrs. John Block, Burlington, Iowa	No Tax
100386	Peter E. Greten, Remsen, Iowa	No Tax
100393	Arthur E. Radabaugh, Colesburg, Iowa	No Tax
100394	Mrs. June Hutchcroft, Mediapolis, Iowa	No Tax

Exhibit 2—Part 5—Continued

Reg. No.	Name and Address	Tax Paid
100395	William Aberly, Riceville, Iowa	No Tax
100396	J. A. Jensen, Cresco, Iowa	No Tax
100397	Mrs. Art Kohl, Anamosa, Iowa	No Tax
100398	F. J. Merrill, Charles City, Iowa	No Tax
Total amount of tax paid		$2,880.15
Total number of retailers		136

[fol.69] Part 6

Foreign Corporations Registered for Collection of Use Tax Under Provisions of Section 8 of Iowa Personal Property Use Tax Law

Reg. No.	Name and Address	Tax Paid
100002	R. C. A. Mfg. Co., Inc., Camden, N. J.	$ 327.25
100003	Ohmer Register Co., Dayton, Ohio	71.51
100004	Illinois Oil Co., Rock Island, Ill.	578.25
100005	Westinghouse Electric Elevator Co., Chicago, Ill.	13.82
100007	The Liquid Carbonic Corp., Chicago, Ill.	1,146.75
100009	Singer Sewing Machine Co., New York, N. Y.	30.63
100010	Allis-Chalmers Mfg. Co., West Allis, Wisconsin	428.63
100011	U. S. Tire Dealers Mutual Corp., New York, N. Y.	23.07
100012	General Electric X-Ray Corp., Chicago, Ill.	1,093.61
100014	Toledo Scale Co., Toledo, Ohio	No Tax
100015	Carbide & Carbon Chemicals Corp., New York, N. Y.	87.73
100016	The Linde Air Products Co., New York, N. Y.	176.11
100017	The Prest-O-Lite Co., Inc., New York, N. Y.	72.98
100018	Burroughs Adding Machine Co., Detroit, Michigan	3,266.30
[fol.70]		
100020	Skelly Oil Co., Kansas City, Missouri	No Tax
100022	International Bus. Machine Corp., New York, N. Y.	545.21
100023	Ideal Equipment Co., Morristown, Minn	7.79
100024	Lowry-Miller Lumber Co., Princeton, Missouri	No Tax
100025	American-LaFrance & Foamite Industries, Inc., New York, N. Y.	248.33
100026	Fruehauf Trailer Co., Detroit, Michigan	No Tax (Canc.)
100027	The Michigan Silo Co., Peoria, Ill.	204.70
100028	J. D. Adams Co., Indianapolis, Ind.	3,568.37

EXHIBIT 2—Part 6—Continued

Reg. No.	Name and Address	Tax Paid
100029	Des Moines Nettleton Co., Inc., Syracuse, N. Y.	No Tax (Canc.)
100030	Penn Oil & Supply Co., St. Joseph, Missouri	153.02
100031	Griffin Wheel Co., Chicago, Illinois	737.53
100032	Marchant Calculating Co., Emeryville, Calif.	20.00
100033	Monumental Sales & Mfg. Co., St. Cloud, Minn.	1,264.90
100034	Portable Elevator Mfg. Co., Bloomington, Ill.	No Tax
100035	Schmoller & Mueller Piano Co., Omaha, Nebr.	No Tax
[fol.71]		
100037	E. I. Du Pont De Nemours & Co., Wilmington, Delaware	429.69
100038	Underwood Elliott & Fisher Co., New York, N. Y.	701.51
100039	Cork Insulating Co., Chicago, Ill.	No Tax
100040	J. & R. Motor Supply Co., Chicago, Ill.	No Tax (Canc.)
100041	Viscosity Oil Co., Chicago, Illinois	76.01
100042	Jewell Tea Co., Inc., Barrington, Ill.	3,208.33
100043	Cook Paint & Varnish Co., Kansas City, Missouri	17.23
100044	Roy Bennett, Inc., Quincy, Ill.	No Tax (Canc.)
100046	Decorators Wall Paper Co., Inc., St. Louis, Missouri	No Tax
100047	Sanitary Scale Co., Belvidere, Ill.	33.35
100048	Ed. Friedrich Sales Corp., San Antonio, Texas	29.48
100050	General Tire & Rubber Co., Akron, Ohio	271.41
100051	Ditto, Inc., Chicago, Ill.	525.57
100052	Continental Car-Na-Var Corp., Brasil, Ind.	76.69
100053	Lewistown Pipe Co., Ft. Wayne, Ind.	No Tax
100054	The B. F. Goodrich Co., Akron, Ohio.	132.37
100056	Compex Company, Chicago, Ill.	No Tax
100057	Clarin Mfg. Co., Chicago, Ill.	49.82
[fol.72]		
100058	Monroe Calculating Machine Co., Inc. Orange, N. J.	107.73
100059	Ceco Steel Products Corp., Omaha, Neb.	641.19
100060	Standard Oil Co., Chicago, Ill.	8,460.15
100061	Goodman Jewelers Inc., St. Paul, Minn.	No Tax
100062	Allied Laboratories, Inc., Kansas City, Mo.	1,776.14
100064	Wheeling Corrugating Co., Wheeling, W. Va.	No Tax
100065	W. G. Woodward Co., St. Louis, Mo.	No Tax (Canc.)

EXHIBIT 2—Part 6—Continued

Reg. No.	Name and Address	Tax Paid
100067	Royal Typewriter Co., Inc., New York, N. Y.	12.38
100068	Fairbanks, Morse & Co., Omaha, Neb.	428.78
100070	H. N. Greis, Trustee, Deep Rock Oil Corp., Chicago, Ill.	163.97
100071	Storz Supply Co., Omaha, Nebraska	110.48 (Canc.)
100072	Shell Petroleum Corp., St. Louis, Mo.	1,200.77
100073	The Creamery Package Mfg. Co., Chicago, Ill.	1,024.48
100074	General Electric Co., Schenectady, N. Y.	5.53
100075	The J. B. Ford Sales Co., Wyandotte, Michigan	75.99
100076	Crane Co., Davenport, Iowa	510.24
100084	Air Reduction Sales Co., New York, N. Y.	60.27
[fol.73]		
100085	Frigidaire Division, Gen. Motors Sales Corp., Des Moines, Ia.	127.77
100087	Armour & Company, Chicago, Ill.	92.59
100090	Blue Valley Creamery Co., Chicago, Ill.	No Tax
100091	The City Ice & Fuel Co., Chicago, Ill.	23.90
100093	Socony-Vacum Oil Co., Inc., St. Louis, Missouri	99.10
100094	U. S. Sanitary Specialties Corp., Chicago, Ill.	126.04
100096	The Louis Allis Co., Milwaukee, Wisconsin	No Tax
100129	Sherman's Associated Stores Co., Cleveland, Ohio	No Tax
100131	American Type Founders Sales Corp., Elizabeth, N. J.	No Tax
100132	Eastman Kodak Stores, Inc., Des Moines, Iowa	No Tax (Canc.)
100134	Jageman-Bode Co., Keokuk, Iowa	No Tax (Canc.)
100135	Hinde & Dauch Paper Co., Sandusky, Ohio	No Tax
100145	Certain - Teed Products Corp., New York, N. Y.	667.54
100146	Western Newspaper Union, Sioux City, Iowa	No Tax
100148	Dutch Mill Oil Co., Madison, Wisconsin	8.97 (Canc.)
100149	Oliver Farm Equipment Sales Co., Chicago, Ill.	11.14
[fol.74]		
100150	T. E. Ibberson Co., Minneapolis, Minn.	818.70
100158	Kennedy & Parsons Co., Omaha, Nebr.	No Tax
100159	Westinghouse Electric Supply Co., Chicago, Ill.	697.58
100163	Crane Co., Sioux City, Iowa	380.08
100164	Atlas Powder Co., Wilmington, Delaware	9.53

EXHIBIT 2—Part 6—Continued

Reg. No.	Name and Address	Tax Paid
100165	The National Refining Co., Dubuque, Iowa	98.06
100166	The Austin-Western Road Machinery Co., Aurora, Ill	1,320.21
100167	General Electric Supply Corp., Bridgeport, Conn	No Tax
100170	Rock Island Fuel Co., Rock Island, Ill.	186.78
100171	The Todd Sales Co., Inc., Rochester, N. Y	146.52
100178	Durabilt Steel Locker Co., Aurora, Ill	94.25
100179	The National Cash Register Co., Dayton, Ohio	1,972.29
100194	Remington Rand Inc., Buffalo, N. Y	No Tax
100199	Line Material Co., South Milwaukee, Wis	127.68
100201	Wisconsin Great Lakes Coal & Dock Co., Milwaukee, Wis	56.78
100205	The Sprague Meter Co., Bridgeport, Conn	34.08
[fol.75]		
100213	James Mfg. Co., Fort Atkinson, Wisconsin	009.38
100215	Albert Pick Co., Inc., Chicago, Ill	589.95
100220	The Master Builders Co., Cleveland, Ohio	34.46
100225	Crane Co., Mason City, Iowa	208.72
100228	Central Oil & Grease Co., Rock Island, Ill	99.61
100235	Pure Carbonic, Inc., New York, N. Y	.32
100239	J. I. Case Co., Rock Island, Ill	23.55
100240	Honan-Crane, Inc., Lebanon, Ind	3.30
100241	Graybar Electric Co., Inc., New York, N. Y	3.65
100243	National Poster Exchanges, Inc., Omaha, Nebr	1.49
100249	Victor Adding Machine Co., Chicago, Illinois	No Tax
100250	National Carbide Corp., New York, N. Y	120.78
100252	James Stewart Corp., Chicago, Ill	No Tax (Canc.)
100263	Otis Elevator Co., St. Louis, Mo	89.84
100270	Standard Barber & Beauty Supply Inc., Omaha, Nebr	No Tax
100279	The Pure Oil Company, Chicago, Ill	No Tax
100281	Westinghouse X-Ray Company, Inc., Long Island City, N. Y	526.20
[fol.76]		
100282	Interstate Memorial Co., St. Cloud, Minnesota	8.61
100294	L. G. Balfour Co., Attleboro, Mass	52.86

EXHIBIT 2—Part 6—Continued

Reg. No.	Name and Address	Tax Paid
100298	Woodstock Typewriter Co., Chicago, Ill.	235.64
100299	The Kelley-Koett Mfg. Co., Inc., Covington, Ky	169.82
100300	Ralston Purina Co., Davenport, Iowa	No Tax (Canc.)
100302	Hercules Powder Co., Wilmington, Delaware	48.42
100305	Gehl Bros. Mfg. Co., West Bend, Wisconsin	No Tax
100307	Ed. Friedrich Sales Corp., San Antonio, Texas	No Tax (Canc.)
100314	Geo. H. Weyer, Inc., Kansas City, Mo.	528.97
100315	Real Silk Hosiery Mills, Inc., Indianapolis, Ind	958.58
100316	Armstrong Cork Products Co., Lancaster, Pa	216.66
100317	Kremers-Urban Co., Milwaukee, Wis.	No Tax
100318	Kinsley Laboratories, Kansas City, Mo.	.98
100319	Missouri Valley Serum Co., Kansas City, Kansas	.87
100320	The Fostoria Serum Co., Fostoria, Ohio	4.39
100321	Norden Laboratories, Lincoln, Neb.	207.60
[fol.77]		
100322	St. Joseph Veterinary Laboratories, St. Joseph, Mo	7.10
100323	Colorado Serum Co., Denver, Colorado	6.29
100326	Deep Rock Oil Corp. of Nebraska, Omaha, Nebraska	17.23
100327	Oliver Farm Equipment Co., Chicago, Ill	No Tax
100331	Stors Supply Corp., Omaha, Nebraska	34.29
100332	Will Ross, Inc., Milwaukee, Wis	No Tax
100333	Merchants Chemical Company, Omaha, Nebr	No Tax
100334	B. A. Railton Co., Chicago, Ill	113.46
100335	Universal Atlas Cement Co., Chicago, Ill.	No Tax
100336	Westinghouse Electric & Mfg. Co., Pittsburgh, Pa	No Tax
100337	The Corn States Serum Co., Omaha, Nebr	84.23
100338	V. Mueller & Co., Chicago, Ill	113.85
100339	Sunshine State Poultry Lab., Sioux Falls, S. Dak	12.85
100340	Paul B. Elder Co., Bryan, Ohio	3.64
100341	Grain Belt Supply Co., Omaha, Nebraska	14.69
100342	Physicians & Hospitals Supply Co., Minneapolis, Minn	159.05
100343	Natkin & Company, Des Moines, Iowa	77.85
100345	Farmers Merchants Oil Co., Ellsworth, Minn	No Tax

Exhibit 2—Part 6—Continued

Reg. No.	Name and Address	Tax Paid
[fol.78]		
100346	Jensen - Salsbery Laboratories, Inc., Kansas City, Mo.	150.10
100347	The S. E. Massengill Co., Kansas City, Mo.	190.22
100348	National Laboratories Corp., Kansas City, Kans.	1.36
100349	Corn Belt Serum Co., E. St. Louis, Ill.	.06
100353	R. J. Strasenburgh Co., Rochester, N. Y.	1.17
100354	The Warren-Teed Products Co., Columbus, Ohio	No Tax
100355	Sutliff & Case Co., Inc., Peoria, Ill.	374.30
100358	Armour & Co., Vet. Div., Kansas City, Kansas	No Tax (Canc.)
100359	Peoria Barber Supply Co., Peoria, Ill.	46.39
100360	A. W. Co., Inc., of Nebraska, Omaha, Nebr.	508.24
100365	National Theatre Supply Co., New York, N. Y.	152.60
100371	Liberty Laboratories, Inc., Omaha, Nebr.	4.08
100372	Miller-Hasselbalch Co., Omaha, Nebr.	No Tax
100374	Lederle Laboratories, Inc., New York, N. Y.	.95
100376	The Hobart Mfg. Co., Troy, Ohio	237.22
100379	Chemical Distributors, Inc., Chicago, Ill.	No Tax
[fol.79]		
100380	Hillyard Sales Co., St. Joseph, Mo.	No Tax
100385	Skelgas Co., Kansas City, Mo.	No Tax
100387	Nebraska Bridge Supply & Lumber Co., Omaha, Nebr.	No Tax
100389	Peerless Serum Co., Kansas City, Kansas	No Tax
100392	The Long Bell Lumber Co., Kansas City, Missouri	No Tax
100399	Universal Laboratories, St. Louis, Missouri	No Tax
Total amount of tax paid		$48,436.59
Total number of retailers		169

Part 7

Out of State Firms (not Corporations) Registered for Collection of Tax Under Section 9 of Personal Property Use Tax Law

Reg. No.	Name and Address	Tax Paid
100275	John J. Kroner, Chicago, Ill.	$ 11.98
100357	Guilfoil Serum Co., Kansas City, Kans.	13.66
100363	Dr. Paul Jucknies, Omaha, Nebr.	No Tax
100390	Nelson Laboratories, Sioux Falls, S. Dak.	No Tax
100391	Morton Products Co., Morton, Ill.	No Tax

EXHIBIT 2—Part 7—Continued

[fol.80]

Total amount of tax paid	$	25.64
Total amount of retailers		5

Recapitulation

	No. of Accounts	Tax Paid
Part 1	63	$ 2,048.98
Part 2	14	867.14
Part 3	10	210.90
Part 4	2	9,397.77
Part 5	136	2,880.15
Part 6	169	48,436.59
Part 7	5	25.64
Non-Registered Retailers Returns		100.81
Total	399	$63,967.98

EXHIBIT "A"

The same being a transcript by Gordon L. Elliott of the testimony taken in cause No. 4646—Equity in the District Court of the United States, Southern District of Iowa, Central Division, referred to in the stipulation, and the following is an abstract of testimony contained in said transcript.

HARRY A. WELSHER, a witness on behalf of the complainant (Sears, Roebuck & Company) having been first duly sworn by the clerk, testified as follows:

Direct examination:

I live in Elhurst, Illinois, and I am an auditor for Spiegel, Inc., located at 1061 W. 35th Street, Chicago, Illinois. I [fol. 81] have been an auditor with this company for the past twenty years. This company is engaged in the mail order business selling household furniture and wearing apparel. This company distributes catalogs to prospective customers twice a year and such catalogs are sent to people who are residents of Iowa. This company maintains no place of business within the State of Iowa but gets its orders by mail from customers, delivering to purchasers mainly through parcel post or freight. All shipments are made from Chicago, the company's only place of business. Dur-

ing the past year, sales made to Iowa residents amounted to approximately a million and a quarter dollars upon which no use tax was collected.

Cross-examination:

As auditor my particular job is the preparation of the financial statements and I have charge of the general books of the company. My estimate of a million and a quarter dollars was based on records we have in the office. We have no retail outlets in the State of Iowa, nor in any state other than the State of Illinois and Spiegel & Company has never made application to be designated as a withholding agent under the provisions of Section 9 of the Iowa Use Tax Act.

Redirect examination.

Our business is an installment business and records of sales are kept for that reason.

THEODORE V. HOUSER, called as a witness on behalf of the complainant (Sears, Roebuck & Company) having first been duly sworn by the Clerk, testified as follows:

[fol. 82] I am the general merchandise manager of Sears, Roebuck & Company located in Chicago, and I have been with the company approximately ten years. We have twelve stores in Iowa classified with reference to size and types of merchandise carried. There is one "A" store which is the largest store and carries a complete line; seven "B-1" stores, and four "B-2" stores. Sears, Roebuck & Company has mail order stores in Chicago, Minneapolis and Kansas City, Missouri, but no mail order stores in Iowa. Sears, Roebuck & Company mail catalogs to purchasers and in 1937 mailed out approximately 600,000 small catalogs and 427,000 large catalogs. Such catalogs are mailed to residents of Iowa. The company also sends prospective customers bulletins soliciting orders. The merchandise carried in the mail order stores differs from the merchandise carried in the retail stores in range of items and character of the merchandise carried. I have general supervision of the purchase and selection of the merchandise that is carried by the mail order concerns, the preparation

of the catalog and the preparation of the merchandise lists which are sent to the retail stores. We carry approximately 59,000 items in the mail order stores and an "A" retail store would carry about 19,000 items and a "B-1" retail store would average about 12,000 items and a "B-2" retail store about 9,000 items. With regard to the percentage of items which are carried in the several types of retail stores as compared to the items carried in the mail order stores, I will state that the smaller a store the larger the proportion of items that would be the same as the mail order items. In a "B-2" store approximately 70% of the items would be the same as we quote in the catalog; in the "B-1" store approximately 60% would be the same, and in the "A" store, such as we have in Des Moines, probably 45% would be the same. None of the stores which we have in [fol. 83] Iowa contain sufficient space to carry on therein successfully a mail order business.

Most orders contain more than one item and it would be impossible for a retail store to fill more than an exceedingly small percentage of multiple item orders.

I know of the concern called Spiegel's, Incorporated. I have been through their plant and know that they distribute catalogs and know that they conduct a mail order business selling the same range and the same different kinds of merchandise that we do. I know of a concern called the Chicago Mail Order House located in Chicago engaged in the mail order business and that they likewise distribute catalogs and their business is conducted under the usual mail order method. I know of a concern called the National Bellas Hess located in Kansas City, Missouri. I have been through their plant and their business is the same as the Chicago Mail Order House. I know of a concern called the Jim Brown Fencing Company located in Adrian, Michigan, and they sell by mail order, heavy lines such as hardware, mechanical lines, fencing, etc., and they sell by means of catalogs. Neither the Chicago Mail Order House, the National Bellas Hess Company, nor the Jim Brown Fence Company has any establishment in the State of Iowa. We consider them all in direct competition with Sears, Roebuck & Company. Assuming that neither Spiegel's Incorporated, nor the Chicago Mail Order House, nor the National Bellas Hess Company, nor the Jim Brown Fence Company did not collect 2% of the purchase price for use tax on sales made to residents of Iowa and the Sears, Roebuck Company did collect

such 2% use tax, then in my opinion the mail order business of Sears, Roebuck & Company would be seriously impaired through this 2% differential.

[fol. 84] Illinois has a sales tax and we collect that tax from Illinois customers. The Illinois tax has been in effect since 1933 and we collect the tax by pasting a tip on the cover of our catalogs as a notice to Illinois customers requesting them to include an amount to cover that tax and giving a schedule of the amount required for various amounts of orders. At the beginning something less than one-half sent any tax at all and today the percentage has grown from 1933 until approximately 65 per cent of our orders include an allowance for such a tax. Where orders were not accompanied by an amount to cover the sales tax in Illinois, we would fill the order and send the customer a "due us" slip requesting payment of the difference. We do not hold up the orders as this would be impossible from the standpoint of the operation of our plant.

We receive a large number of orders each day and put them through on a time schedule and there is no allowance or arrangement for withholding orders from that time schedule. It would substantially increase the cost of operating our business to hold such orders in suspension and it would require a major re-arrangement of the character of the business. Our experience is that we collect not more than 35% of the value of such "due us" shortages. Assuming that upon sales to residents of the State of Iowa through mail order, the use tax if applied would amount to $100,000 per year, then based upon our experience in the State of Illinois, the maximum amount that could be collected would be around $68,000. To do that would entail a direct cost within our business of approximately $13,700.00.

The compensation paid to a store manager is affected by the net profits of the store. The retail store located in Iowa gains no benefit and the manager's earnings are not affected [fol. 85] by the business coming from orders mailed by customers from Iowa to the mail order plants.

Cross-examination.

In Illinois the Sears, Roebuck & Company remit the full amount of the tax it should have collected to the State. By putting little notices in the front of the catalog, we have been able to collect 65% of the tax in the State of Illinois. If we

used the same method in the State of Iowa, I would say that we would collect out of $100,000 tax approximately $68,000. This would cost us about $18,000 made up of the cost of preparing forms, tipping the catalogs and extra correspondence. It took us five years to reach the 65% and we have employed no new technique in the matter of the collection of this tax. The cost of setting up accounts on our books for this tax would be more than the amounts involved, but I do not have anything to do with the running of the auditing department. The requirement that we collect the Illinois tax was not ruinous to our business in Illinois. These other companies, such as the Jim Brown Fence Company are not located in Illinois, but I do not know how much our business was affected by their competition in Illinois. The National Bellas Hess Company is located in Kansas City, but I do not know the effect of their Illinois business on our business even though we were required to collect the sales tax on Illinois orders.

Q. You don't know the effect. Then I take it that your entire line of testimony as to the effect on your business if you were required to collect the tax in the State of Iowa, the use tax, is just a matter of conjecture and speculation on your part, is it not?

A. No, sir.

Q. It is not. You have had actual experience with the sales tax and the collection of it in the State of Illinois and [fol. 86] you don't know how, if at all, it has affected your business in regard to competition with National Bellas Hess or the Jim Brown Fence Company?

A. I know what two per cent additional would do to our business in a state where we are in mail order competition with another firm that does not pay it.

In each store situated in Iowa there is a catalog station available for any person who would care to come to that store and inspect that catalog. Order blanks are kept at each store and a clerk will assist in filling out an order blank. In addition to the twelve retail outlets there are other catalog stations, but I do not know how many. There might be one or two.

The managers of the retail outlets are paid a definite salary and a bonus. The bonus being dependent upon the net profit of the particular store they manage. No credit would be given the local store by reason of an order sent to the mail order department from the catalog station or

store. The managers of our stores are permitted to arrange a bonus or commission for the clerks in the various departments if they desire to do so. I do not know what the usual practice is in Iowa. If a customer inquired from a clerk in the store as to whether or not he would have to pay a use tax upon an order, I believe the clerk would inform him that if he himself mailed the order that there would be no sales tax or use tax charged. By a bulletin sent to the stores on January 1, 1938, managers of the stores were notified that thereafter they were to collect the use tax from the customer on those orders sent by the local store to the mail order house for shipment direct to the purchaser. Prior to that time it had been the policy of Sears, Roebuck & Company not to require the collection of the use tax on those orders taken in the local stores and sent by the local stores to the mail order house for shipment direct to the purchaser. In [fol. 87] that bulletin there is no notice to purchasers that they would be required to send the use tax on orders sent direct by the purchaser to the mail order establishment.

Redirect examination:

As general manager of the merchandising department I do make a study of catalogs issued by competitors. Speigel's Incorporated and the Chicago Mail Order House are in direct competition with Sears, Roebuck & Company. This is also true of National Bellas Hess Company and the Jim Brown Fence Company, but to a lesser degree. The setting up of books and records with respect to the amount of the Iowa Use Tax would delay the filling of orders which we would consider a very serious matter. We try to get out 100 per cent of the orders the same day as received and we come within a small percentage of this. Price and speed of delivery are all important in the mail order business.

CHARLES E. KALLAL, called as a witness on behalf of the complainant, (Sears, Roebuck & Company) having been first duly sworn by the Clerk, testified as follows:

I have been with Sears, Roebuck & Company approximately seven years and ten months and I am now in charge of the sales and use tax division. Sears, Roebuck & Company do not keep any individual account of mail order ship-

ments to residents of the State of Iowa from the three plants located outside of the State. The approximate amount of those sales in a given year can be arrived at, however, by what we term the advance case ratio. As the orders are received in Chicago, Minneapolis and Kansas City the mail is opened and the case is run up on a register by key, this key designating the state from which [fol. 88] such order and cash is received. Thus we can arrive at a percentage although such things as adjustments or refunds would not be reflected in the aggregate total. Sometimes the remittance is short in which event we generally do not hold up the shipment, but we send along with this shipment a "due us" or a "you owe us" form for the shortage. By the advance cash ratio method I will state the approximate aggregate amount of the mail order sales in Iowa in orders received by mail and shipped from the Chicago, Kansas City and Minneapolis stores for the year 1937 amount to approximately $5,400,000. Of that amount approximately $2,280,000 represented shipments from the Chicago plant, $1,140,000 from the Kansas City plant and $2,000,000 from the Minneapolis plant. The average cash per order is determined weekly and in 1937 it was in the neighborhood of $4.00 cash received per order. Based on the general catalog distributions there were some 300,000 customers of Sears, Roebuck mail order department. For the year 1937 there were approximately 1,200,000 orders received from Iowa customers. In 1936 mail order sales to Iowa customers from the Chicago mail order house was 2,400,000, from the Kansas City mail order house, 1,200,000 and from Minneapolis, 2,250,000. The aggregate sales of retail stores located in Iowa in the year 1936 amounted to 5,080,000 and for 1937, 5,600,000.

Cross-examination:

In my position as manager of the sales and use tax division I gather tax data. The average case received per order is $4.00 and I have heard it remarked by one of the men in the accounting department that 92% of our business is cash, but I have never made any study of that. We distribute 300,000 large general catalogs to people in Iowa, but we have no record of the number of people to whom we [fol. 89] distribute the small catalog. I do have figures that make it approximately 50% more, or in other words I would

say 450,000. We received approximately 1,200,000 orders from Iowa customers, but we do not have any way of determining whether or not those orders were from the particular customers to whom we sent catalogs. The total of the mail order business of Sears, Roebuck & Company in 1936 for the United States was approximately two hundred million and in 1937 slightly over two hundred and two million. Sears, Roebuck & Company operates in 47 states and the District of Columbia and they do not collect any use tax imposed by the laws of any state on what we call direct mail orders sales. This gain in the retail business in the State of Iowa by the retail store is not an isolated case but inasmuch as the total retail sales have increased it might be presumed to be general and in line with the general trend in connection with our retail stores all over the United States. In 1936 our retail stores did approximately 325 million and in 1937, approximately 371 million, so there has been a gain of 46 million in 1937 over 1936 in connection with retail establishments as compared to a gain of two million in mail order establishments. By mail orders, we mean where the local customer himself places the order in the mail.

Mr. Bookin: Preliminary proof and identification having been waived, the defense now offers in evidence Exhibit No. "1", being pages 1 to 3 both inclusive.

Judge Sanborn: It will be received.

Jack C. Tincher, called as a witness on behalf of the defendants, having been first duly sworn by the Clerk, testified as follows:

I am an employe in the Iowa Sales and Use Tax Department under the Iowa State Board of Assessment and Review. I am in charge of the use tax department.

[fol. 90] Q. Mr. Tincher, at my request have you made a compilation from the official records in your charge of the names of the domestic corporations registered under Section 8 of the Use Tax Act, of the names of the foreign corporations registered under Section 9 of the Use Tax Act, of the out of state firms, not corporations, registered for collection of the tax, of the use tax, of the mail order houses registered under Section 8 of the Iowa Personal Use Tax Act maintaining retail establishments within the State of

Iowa, of Iowa residents not corporations registered under Section 8 of the Iowa Personal Property Use Tax law for collection of the tax on sales for use in Iowa, of foreign corporations registered for the collection of use tax under the provisions of Section 8 of the Iowa Personal Property Use Tax law, and of out of state firms not corporations registered for collection of the tax under Section 9 of the Personal Property Use Tax law, and of the amounts that each of these firms that so registered and designated in Exhibit "2" have paid to the State Board of Assessment and Review?

A. Yes, sir.

Q. I will ask you if Exhibit "2" is that compilation?

A. Yes, sir.

Q. Is it a true and correct compilation as taken from the books and records of the Iowa State Board of Assessment and Review under your control and charge?

A. It is.

Q. The records under your control and charge?

A. Yes, sir.

Mr. Bookin: In connection with the testimony of the witness Mr. Tincher, I now offer in evidence Exhibit "2".

Mr. Gamble: We do not object on account of the form to the offer of the exhibit, but we do object on the ground that it is immaterial.

[fol. 91] Judge Sanborn: It will be received subject to the objection.

(Complainant excepts.)

Evidence closed.

On December 21, 1938, the Court rendered the following

OPINION OF THE COURT

The record shows that the plaintiff is a foreign corporation organized under the laws of the State of New York, duly licensed, under the general statutes regulating such matter, to do business in the State of Iowa, and that such license to do business in the State of Iowa was granted a considerable period of time prior to the enactment of what is commonly known as the Use Tax Act by the legislature of the State of Iowa.

That following the licensing of the plaintiff to do business in the State of Iowa, and up to the commencement of this action, the plaintiff has made large investments in the State of Iowa in connection with the establishment and operation of some twelve retail stores. That the plaintiff has complied with the statutes of the state relative to the assessment of its property located within the state and the payment of taxes thereon, the collection and accounting for the so-called sales tax under the laws of the State of Iowa, on merchandise sold by it in its various stores in Iowa, and the so-called use tax, save and except in the particular as hereinafter mentioned. That the plaintiff operates a very extensive business in the various states of the United States, and in its business organization or setup, it maintains at certain designated localities units of its business which are confined exclusively to what is known [fol. 92] as the mail order business. That it has one such unit located in the City of Chicago, Illinois, one in Kansas City, Missouri, and one in Minneapolis, Minnesota, together with certain other units of like kind located elsewhere in the United States but which are not involved in this case before the court.

That periodically during the year plaintiff causes to be printed and issued what may be termed a general catalogue, which it disseminates to prospective purchasers or customers throughout the territory served by these mail order units of its business, and that such catalogues or publications are circulated throughout the State of Iowa. That customers of the plaintiff in ordering from such catalogues use a form supplied by the plaintiff in which the purchaser designates the specific property which the customer is purchasing, by proper reference to the designation of such article in the catalogue; the purchaser encloses with such order the amount to cover the purchase price, together with the cost of transportation from the mail order unit to which the order is addressed, to the point designated in Iowa by the customer. By specific terms embraced in the order blank, the plaintiff reserves the right of acceptance of the order at the point of reception, that is, either in Chicago, Kansas City, or Minneapolis, according to the unit to which the customer may mail his order, and the delivery of the goods to the purchaser is designated to be at and of the point of the location of the mail order unit so receiving said order from said

customer. That is, if the order is received at Chicago, Illinois, the point of delivery to the customer is specifically provided to be in Chicago, Illinois, and likewise with respect to the other units at Kansas City and Minneapolis, if the order is transmitted from the customer to such unit through the mail or otherwise.

[fol. 93] On orders of this character so received at these mail order units in these several locations, the plaintiff, although demand has been made upon it by the defendants in this action who compose the Iowa State Board of Assessment and Review and who are designated by the so-called use tax act as the body having the enforcement of said use tax law under its authority and control, has refused to collect from the mail order purchaser the said so-called use tax upon the items covered in any of the purchases so made in the manner as indicated herein.

That prior to the commencement of this action, and on or about the 30th day of March, 1938, the defendants caused to be served upon the plaintiff a notice and order advising the plaintiff that unless it complied with the demands of the defendants to collect upon such mail order items the use tax, and remit the same to the State of Iowa through said Board of Assessment and Review, that the said Board would proceed with the necessary steps under the statutes of Iowa to cause a revocation of the right of the plaintiff to transact business in the State of Iowa and to oust from the State of Iowa the said retail establishments of the plaintiff so theretofore established under the general authority granted to it to transact business in the State of Iowa prior to the adoption of the said use tax law, and that following the serving of said notice and order upon the plaintiff this action was commenced to restrain the defendants from carrying out their threatened action looking toward the cancellation of the right of the plaintiff to transact business in the State of Iowa through the medium of the said retail stores, and to oust them from the transaction of business within the state.

By appropriate allegations in plaintiff's petition, the contemplated action of the defendants with respect to the cancellation of the right of the plaintiff to transact business [fol. 94] in Iowa is attacked on numerous constitutional grounds involving alleged violation of constitutional provisions of the Constitution of the United States and also constitutional provisions of the Constitution of the State

of Iowa, which it is claimed protects the plaintiff in the situation, and which would be violated if the threatened action of the defendants was carried out to its proposed culmination.

For the purposes of a disposal and a decision of the rights of the parties in this case, the court feels that only certain of these various questions so raised by the plaintiff are necessary to be determined for a solution in this case, and the court will proceed in the subsequent portions of this opinion to pass upon and decide the rights of the parties in this case, bottomed upon the questions touched upon in this opinion, and those only, as, in the judgment of the court, the final conclusion as arrived at in this opinion disposes of the rights of the parties and is a complete adjudication of the merits of this case.

The plaintiff contends that under the fact situation as it is disclosed by the record in this case, the so-called use tax act, interpreted and applied as is attempted to be done by the defendants in connection with the plaintiff's business, violates Section 8 of Article I of the United States Constitution, the same being what is commonly known and understood to be the interstate commerce clause of the Constitution of the United States, and in this connection the plaintiff points out that under the use tax act it is provided as follows:

Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state, not exempted under the provisions of section three hereof nor collectible under the provisions [fol. 95] of section six hereof, shall at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the board, if the board shall, by regulation, require such receipt. Each such retailer shall list with the board the name and address of all his agents operating in this state, and the location of any and all his distribution or sales houses or offices or other places of business in this state.

And it is claimed by the plaintiff that this provision of the law which attempts to force the plaintiff to collect the use tax on these mail order items is an invasion of the powers

of Congress under Section 8, Article I of the Constitution of the United States, for that, the effect of the act is to regulate interstate commerce between the states of Illinois, Missouri and Minnesota, and the State of Iowa, as the case may be in the particular facts surrounding the particular mail order item involved, and that the effect of it is to place an undue burden upon the plaintiff in respect to an interstate commerce item, which the State of Iowa is denied the right to legislate in respect to by said Section 8 of Article I of the Constitution of the United States, all power in respect thereto being reserved to the Congress of the United States.

In the oral argument in the submission of this case to this court, the attorney for the State of Iowa substantially admitted that the contentions of the plaintiff would be true if the so-called use tax act was to be literally construed in strict accord with the language of the act as herein quoted, but claimed that it was incumbent upon this court to construe the said use tax act so as to harmonize the same [fol. 96] with the Constitution of the United States in the particular complained of, if the act was susceptible of such construction, and that it was so susceptible to such construction, by construing the act so as not to require the plaintiff to collect the use tax at the time of making such sales in Illinois or Missouri or Minnesota, as the case may be, but contended that it became the duty of the plaintiff-seller to follow the items sold into the State of Iowa and collect the use tax when the interstate commerce feature had ceased to exist by reason of the article coming to rest within the State of Iowa, and that so construed the act would not be violative of the commerce clause of the Federal Constitution.

The answer to the contentions of the State is,

First: That such interpretation is contrary to the express language of the act, for that it is provided that the seller

shall at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser,

and nowhere in the act is there any other provision for the manner or time of collection, which applies to the plaintiff under the facts in this case. The State contends that the word "shall" should be construed as "may", for that in

numerous decisions of our Supreme Court in construing statutes the word "shall" has been construed "may". But, wherever that has occurred, the use of the word "may" in place of the word "shall" does not do violence to the express language of the act, as is apparently true in the situation as it confronts the court in connection with the act under consideration. In other words, if we are to use the [fol. 97] interpretation as suggested by counsel for the State, we would have this law read that the seller

may at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser, etc.,

and in order to give proper effect to the word "may" as used in the act, under such an interpretation, the court would have to give force and effect to the word "may" as if it read "shall", for otherwise there would be no duty created by the statute upon the seller to collect the tax. If the word "may" is to be used literally, it is merely permissive and not mandatory.

Second: A construction and application similar to what is contended for by the State, would result in not only leaving the act open to an attack as violative of Section 8 of Article I of the Constitution of the United States, but would leave it susceptible to the attack because of its violation of Section 1 of the 14th Amendment to the Constitution of the United States, as asserted by plaintiff herein. The effect of the construction as contended for by the State would result in a denial to the plaintiff of the right to contract, for instance, in the State of Illinois, with a prospective purchaser from Iowa, in such a way as to bring about a situation whereby the contract would be exclusively an Illinois contract, as actually exists in connection with the transactions as the record shows with respect to each of these mail order items, and to say to the plaintiff,—

"If you sell to some purchaser living in Iowa, although the transaction may have its inception and its consummation in the State of Illinois, still you are required by the laws of Iowa to retain dominion and jurisdiction over the [fol. 98] item involved in the transaction and to follow the same into the State of Iowa in an interstate shipment where the seller is an involuntary shipper, and to collect the tax

when the interstate feature has ceased to exist and the article has come to rest in the State of Iowa."

A denial of the right to so contract clearly infringes upon the provisions of Section 1 of the 14th Amendment to the Constitution of the United States, for it is an abridgement of the right that the plaintiff is entitled to exercise in the foreign jurisdiction, so far as the State of Iowa is concerned, of entering into contractual relations whereby the plaintiff sells and a resident of this state buys, with the specific conditions in the contract that the delivery shall be at the point of purchase in the foreign jurisdiction and not at a point in the State of Iowa. To deny a citizen of another state the right to so contract with a citizen of this state, certainly is to abridge the privileges and immunities of citizens of the United States and to deny the plaintiff the protection of the said 14th Amendment in that particular. It also would have the effect of denying the equal protection of the laws, as prohibited by the said Section 1 of the 14th Amendment of the Constitution of the United States, for the record shows that there are competitors of the plaintiff in these various localities where plaintiff has these mail order units, who have no places of business in Iowa and who are not affected by the use tax law.

As heretofore suggested, such a construction would also violate the interstate commerce clause of the Constitution of the United States, being Section 8 of Article I, in that it would deny to the plaintiff the right of delivery of the purchase in the foreign state as contemplated by the contract entered into between the seller and the purchaser, as shown by the record in this case, and make it obligatory [fol. 99] upon the plaintiff to retain dominion over the article of sale until it had reached its destination in Iowa, and thereby compel the plaintiff to become an involuntary shipper in an interstate shipment. If anything of that character is possible under the law, it must be through an act of congress and not through the act of a legislature of a given state, because the effect of it is to make the plaintiff engage in interstate commerce with respect to that shipment against the will and judgment of the plaintiff and against its desires, simply because it indulges in the privilege and right which it has as a citizen of the United States to engage in a contractual relation with a citizen of the

State of Iowa, outside the State of Iowa and in a foreign jurisdiction, and although such contract may be in strict conformity to the requirements of the statutes of the state where the contract is made and in conformity to the requirements of the Constitution and the acts of congress with respect to the United States. And, in addition to what has already been suggested, no such result can be accomplished except by and through an extraterritorial effect to the local statutes of Iowa, and to sustain which there have been no authorities submitted to this court by counsel for the State.

The State does contend that this case comes within the pronouncements of the United States Supreme Court in cases of Wiloil Corporation v. Pennsylvania, 294 U. S. 169; Henneford, et al., v. Silas Mason Company, Inc., et al., 300 U. S. 577; State of Minnesota v. George Blasius, 290 U. S. 1; Monamotor Oil Company v. Johnson, 292 U. S. 86, and Felt & Tarrant Mfg. Co. v. Corbett, reported in 23 Federal Supplement on page 186, but the court is of the opinion that an analysis of these cases will clearly establish that they are readily distinguishable from the situation that exists in the case at bar. In all of these cases the language [fol. 100] of the opinion clearly shows that either the owner of the property involved and upon which the tax was sought to be collected, brought the property into the state and the state authorities were proceeding against such owner to collect the tax, or where the state authorities were proceeding to subject the seller to the payment of the tax, such seller was the shipper of the articles into the state and the articles had come to rest in the various states, and the tax was held to apply after the articles had ceased to be in interstate commerce and had come to rest in the state involved and was still within the dominion and control of the seller at the time of the attaching of the tax feature.

The State of Minnesota v. Blasius, supra, is a case where the property was in the possession and control of the owner in the State of Minnesota and the owner contended that it was still in process of interstate commerce, for that it had only come to rest in Minnesota temporarily, the property being cattle, but in the case, Mr. Chief Justice Hughes writing the opinion, points out,

that Blasius did not buy the cattle for the purpose of export or shipment to another State; and that after their purchase

by him, and until he resold, the cattle were "at absolute and complete rest in the yards at South St. Paul" and "were a part of the general mass of cattle in the State and locally owned."

The quoted language here was quoted by Mr. Justice Hughes from the opinion of the trial court and was adopted by the Supreme Court as the fact.

Henneford v. Silas Mason Company, supra, was another case where the property was in the possession and control of the owner in the State of Washington, and the owner, [fol. 101] the plaintiff in the action, being a contractor on the Grand Coulee Dam on the Columbia River, shipped the articles of machinery into the state and they came to rest in the state and had been used for months in the work of the contractor, and again the court held that because they had come to rest in the state, under the control and possession and dominion of the owner, they were amenable to the tax in controversy.

In the Felt & Tarrant Mfg. Co. v. Corbett case, supra, it appears from the language of the opinion as follows:

The plaintiff is an Illinois corporation and it sold comptometers in the State of California by and through the medium of two local agents residing in California; that these agents in selling the articles did so by and through the medium of written contracts which provided that it did not become a contract with the plaintiff until it had been accepted by them at their place of business in Illinois, but the contract contained this provision,

All orders taken must be submitted to and approved by plaintiff, all sales *and deliveries must be made by,* and all bills for such orders as are accepted must be rendered by, *the plaintiff.*

It further appears from the language of the opinion, as follows:

All machines sold for delivery in California are shipped from one of plaintiff's distributing points outside of the state. Sometimes machines are forwarded directly to the purchasers, while in other instances, *in order to secure reduced freight charges,* large groups of machines are shipped to the general agent who makes delivery to the respective purchasers.

[fol. 102] When we consider that under the terms of the written contract all deliveries were required to be made by the plaintiff, and then the further observation of the court is taken into consideration, that in order to reduce freight charges the plaintiff-seller shipped large quantities of machines at one time, it is clearly apparent that in this cited case the shipment of the machines into the State of California was by the plaintiff, and they continued their dominion and control over the machines until the delivery in California, at which time, under the decisions of the Supreme Court of the United States, the articles had ceased to be in interstate commerce and had come to rest in the State of California.

Defendants in the instant case lay great stress upon the decision of the United States Supreme Court in the case of the Monamotor Oil Company v. Johnson, supra. That case had its origin in the State of Iowa, and it is claimed by the defendants in the instant case to be decisive of the question that we have under consideration here.

With this conclusion this court cannot agree. It appears from the opinion in the cited case that the appellant was an Arizona corporation engaged in the business of buying, manufacturing, blending and selling gasoline and kindred products, including the importation into Iowa of gasoline by tank cars, and that in some instances the plaintiff shipped direct to dealers in Iowa, customers of the appellant, and it was claimed by the plaintiff that because of these direct shipments, the burden on interstate commerce was obvious. In disposing of the case the Supreme Court of the United States, Mr. Justice Roberts delivering the opinion, says, in connection with this contention of the plaintiff:

The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor [fol. 103] fuel after it had come to rest in Iowa, *and the requirement that the appellant as the shipper into Iowa shall,* as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant.

Now, when we take the language as quoted from this cited case and consider it in the light of the law defining who was a distributor of motor fuel oil within the meaning of the

statute, it is plain that this decision in the cited case was predicated upon the fact that the Monamotor Oil Company actually was the shipper of the oil, under all circumstances, into Iowa, and continued to have dominion and control over it until a delivery to the dealer in Iowa, because the law defining who is a distributor is as follows:

any person who brings into the state or who produces, refines, manufactures or compounds within the state any motor vehicle fuel to be used within the state or sold or otherwise disposed of by him within the state for use in the state.

So that in order to be a distributor one must either bring the oil into the state or produce it or refine it or manufacture it or compound it, within the state, for use within the state. So that it is apparent that in the consideration and determination of this cited case, the United States Supreme Court understood, and the records show, that on these shipments direct to dealers in Iowa, the Monamotor Oil Company was the shipper and continued in dominion and control of the products so shipped until they came to rest in Iowa and were delivered to the dealers. Under such cir- [fol. 104] cumstances, of course, under the decisions of the United States Supreme Court, as herein cited, the oil having come to rest before delivery to the dealer, the distributor was liable in the first instance for the tax.

This distinction which is pointed out in connection with all of these cases upon which the State relies, is clearly set forth in the opinion of the Supreme Court of the United States in the case of Wiloil Corporation v. Pennsylvania, supra. The opinion in that case was written by Mr. Justice Butler, and in order to have the fact situation clearly before us it is advisable to set out the statement of the facts as found by the court:

Appellant, a Pennsylvania corporation having its principal place of business in Pittsburgh, sells liquid fuels at wholesale and is a distributor as defined by the act. The tax in controversy was laid at three cents per gallon upon the contents of 13 tank cars sold and delivered by it. All were ordered through its agent in Philadelphia for delivery to purchasers at that city or at Essington, Pennsylvania. The orders specified a price per gallon "f. o. b. Wilmington, Del., plus 3c tax," and were subject to, and received, ap-

pellant's approval at its office in Pittsburgh. The purchasers were not licensed or taxable as distributors. All fuels delivered under these contracts were obtained from Crane Hook Company of Wilmington, Delaware, and on the order of appellant were shipped by rail from there to the purchasers in Philadelphia or Essington. Each car moved on a bill of lading in which the appellant was consignor and the purchaser was consignee; the place of shipment indicated was Wilmington and the place of destination was consignee's private siding in Philadelphia or Essington. [fol. 105] Appellant prepared and sent to the buyer an invoice covering each shipment showing the price as stated in the order.

The inference that might be drawn from the f. o. b. order, the billing and straight bill of lading *that the parties intended delivery to purchaser at place of shipment is negatived by other circumstances.* The contracts were executory and related to unascertained goods. It does not appear that when they were made appellant had any fuels of the kinds covered or that those to be delivered were then in existence. There was no selection of goods by purchasers. Appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania. It is the practice in appellant's business to sell f. o. b. at a specified place in order to fix the price and such billing may be merely price fixing and not an indication of the source or place of shipment. *The reference to the tax in the orders and invoices would have been unnecessary if delivery were not to be made in Pennsylvania for if made at Wilmington, the transactions would not have been within the provision of the taxing act.*

The great particularity with which Mr. Justice Butler points out the retaining of the control and dominion over the shipment by the Wiloil Corporation in this cited case, will be noted, and his plainly pointing out that the tax reference in the orders would have been unnecessary.

if delivery were not to be made in Pennsylvania for if made at Wilmington, the transactions would not have been within the provision of the taxing act,

[fol. 106] clearly shows that this matter of dominion and control over shipments of this character is the paramount

and outstanding consideration in determining whether or not the seller of an article is to be held liable in the first instance for a tax of the character we have under consideration in the instant case, and all of the cases upon which counsel for the State of Iowa in the case at bar relies as sustaining his contention of the right of the State to insist upon the collection of the tax in this case under consideration, by the seller, are clearly distinguishable from the fact setup that we have to deal with in the instant case.

As indicated by the reasoning of the court in the instant case and in this opinion, this court is of the opinion, and so holds, that the attempt by the State of Iowa, through the medium of the defendants, the Board of Assessment and Review of the state, to interpret and apply the statute so as to make it obligatory upon the plaintiff to collect the use tax on these items of exclusive mail order transactions wherein the fact situation is as already outlined herein, is clearly violative of the constitutional rights of the plaintiff in regard to invading the rights of the plaintiff under Section 1 of the 14th Amendment to the Constitution of the United States, and in regard to Section 8 of Article I, of said Constitution.

The defendants further contend that even though the court finds as it has already found and expressed herein, that the statute as interpreted and applied by the defendants is violative of the constitutional rights of the plaintiff under the Federal Constitution, that still it is within the legal right of the State to predicate an order cancelling the permit of the plaintiff to transact business in the State of Iowa, upon its refusal to comply with the notice and order as served upon it by the defendants to proceed to collect and report to the defendants for the use tax upon these items [fol. 107] of mail order business, and in support of their claims in this regard this court is cited to several cases, one of the outstanding ones being Security Mutual Life Insurance Company v. Prewitt, 202 U. S. 246. Counsel for the State in oral argument laid emphasis upon this case and several others of a like tenor, but possibly in none of the cases cited is the language quite as positive and extreme as is the language of Justice Peckham in the cited case referred to, and if the cited case was still the law there would be much of merit in the contention of the State on this proposition, but fortunately the United States Supreme Court in the case of Terral v. Burke Construction Co., 257 U. S. 529,

has clarified a doubtful situation which had existed over a period of years in connection with this question now under consideration.

It appears from a reading of the opinion that the Burke Construction Company was a corporation organized under the laws of the State of Missouri; that it had been licensed to do business in the State of Arkansas; that it was organized for the purpose of doing construction work and was actually so engaged in Arkansas; that the right to do business in the state was a valuable privilege, and the revocation of the license would greatly injure it. That it had brought an original suit in the federal court of Arkansas and had removed a suit brought against it to the same federal court; that the Secretary of State was about to revoke the license because of said suit and such removal, acting under the requirement of Section 1 of the Act of the Legislature of Arkansas of May 13, 1907, reading as follows:

If any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding [fol. 108] against any citizen of this State in any Federal court, it shall be the duty of the Secretary of State to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in this State; and if such corporation shall thereafter continue to do business in this State, it shall be subject to the penalty of this Act for each day it shall continue to do business in this State after such revocation.

The penalty was fixed at not less than $1,000.00 a day. The plaintiff construction company averred that the Act was in contravention of Section 2, Article III, being the judiciary article of the Federal Constitution, and of Section 1 of the 14th Amendment. The defendant filed an answer in the case containing some denials, but there was no denial that the plaintiff was a foreign corporation or that it had been duly granted a license to do business in the State of Arkansas, or that its right to do such business in Arkansas was a valuable right, or that it had commenced an action in federal court and removed another one, or that the defendant intended to cancel the plaintiff's license because of the removal of the case to the federal court and the

commencement of the other one therein. Such matters not being denied were accepted as admitted, and then Chief Justice Taft says:

The sole question presented on the record is whether a state law is unconstitutional which revokes a license to a foreign corporation to do business within the State because, while doing only a domestic business in the State, it resorts to the federal courts sitting in the State.
[fol. 109] The cases in this court in which the conflict between the power of a State to exclude a foreign corporation from doing business within its borders, and the federal constitutional right of such foreign corporation to resort to the federal courts has been considered, can not be reconciled. They began with—

And then Chief Justice Taft cites a number of cases involving the question, including Barron v. Burnside, 121 U. S. 186, which went up to the Supreme Court of the United States from the State of Iowa, and in which the Supreme Court had held a statute of the same character as was under consideration in the Terral case from Arkansas, to be unconstitutional, and also this case already referred to, Security Mutual Life Insurance Co. v. Prewitt, 202 U. S. 246, and then he says:

The principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the busines the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void [fol. 110] because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the

supreme fundamental law. It follows that the cases of Doyle v. Continental Insurance Co., 94 U. S. 535, and Security Mutual Life Insurance Co. v. Prewitt, 202 U. S. 246, *must be considered as overruled* and that the views of the minority judges in those cases have become the law of this court. The appellant in proposing to comply with the statute in question and revoke the license was about to violate the constitutional right of the appellee. In enjoining him the District Court was right, and its decree is Affirmed.

This pronouncement of the Supreme Court through the opinion of the late Mr. Chief Justice Taft, is still the law of this country so far as this court has been able to ascertain from an examination of the authorities, and it has been applied on a number of occasions since its pronouncement, one such application being by the late Mr. Justice Holmes in the case of Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426, wherein Mr. Justice Holmes uses the following language:

Coming then to the merits, we assume in favor of the defendants that the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result.

[fol. 111] And further on in the opinion Mr. Justice Holmes refers specifically to the Terral v. Burke Construction Co. case, supra, citing it with approval. How apt in its application to the case at bar is this quotation from this opinion in the cited case under consideration:

One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result.

In the case at bar the State of Iowa, through the instrumentality of the defendants, is seeking to oust the plaintiff company from the right to do business in the State of Iowa because it refuses to perform an act demanded of it which is violative of its constitutional rights under the provisions

of the Federal Constitution as already herein discussed, and saying to the plaintiff,—"Unless you do comply with our illegal demand you will have to get out of the State of Iowa with your retail stores." If that can be accomplished through the medium of legislative enactment of a state and thereby nullify the constitutional inhibitions of the Federal Constitution, there is nothing left of the Federal Constitution which would make it rise to the dignity of the fundamental law of this country, which it is and which it has been recognized to be for all the years since it has been adopted.

So that the court is satisfied that there is no merit in the contention of the State that it can predicate an order of removal against the plaintiff company and compel it to remove from the State of Iowa with its retail stores because of the failure of the plaintiff to acquiesce in the demands of the state through the medium of the defendant Board, in regard to the collection of and accounting to the State for [fol. 112] the use tax on these items involved in the exclusive mail order business of the plaintiff, as described in this opinion.

What has been said in regard to the inability of the State to predicate an order of removal against the plaintiff because of the invalid demand in regard to the tax on these mail order items applies with equal force to the suggestion of the State that because the State of Iowa has reserved by Section 8376 of the Code of 1935, the right and power to legislate as to corporations and to enact laws different from those obtaining at the time of the organization of the corporation, that it has the right to enact mandatory laws of the character involved in this action and to expel a foreign corporation who refuses to comply. The particular section refered to is as follows:

The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of either title 19, 20, 21, or 22 or whose organization may be adopted or amended thereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used, or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general asembly shall deem necessary for the public good.

It must be apparent that this reserved power can only be exercised by and through the medium of legal legislative enactment. Unless the act has been legally enacted and is legal in its effect on the thing legislated with reference to, it is not a law, and never rises to the dignity of a law, and therefore can be of no effect. And it would be astounding [fol. 113] if the pronouncement of the legislature as to what was for the public good would be sustained, notwithstanding the fact that the particular act was found to be violative of the inhibitions of the Constitution of the United States. That is clearly contradictory in its terms. An act that would violate the Constitution of the United States necessarily could never be for the public good.

The same is true of the suggestion by counsel for the State, that in the issuance of the permit to the plaintiff company, there was incorporated the reserved power to proceed with subsequent legislative control similar to what is covered by the section of the Code above quoted. As has been seen in Terral v. Burke Construction Co., supra, even if the plaintiff company in this case before the court, had signed an express waiver and entered the state with that situation and proceeded to transact business, the waiver is held a nullity, and it may resort to the federal courts or to any court in this country for protection against the invasion of its constitutional rights, and it is without liability to be removed from the state on peremptory order because of its invoking the aid of the court to so protect it.

The court has sufficiently outlined herein by its reasoning, that in this case the plaintiff is entitled to the issuance of an injunction permanently enjoining the defendants from doing or performing any or each of the things specified in plaintiff's prayer, insofar as any such act or thing may be predicated upon the failure of the plaintiff to comply with the demands of the defendant Board in connection with the collection of the use tax on items of merchandise sold by and through the medium of the exclusive mail order business of the plaintiff, and in the manner as herein outlined, as the same may occur in any of its exclusive mail order depots or houses loacted outside of the State of Iowa.

[fol. 114] Counsel for plaintiff is directed to prepare a decree in conformity to this opinion, submit the draft of the same to counsel for the State for approval as to form, noting an exception to the state or the defendants on all adverse rulings, and when so approved as to form, submit the same

to this court for signing and entering of record in the case.
Signed John J. Halloran, Judge.

(Copy)

JUDGMENT AND DECREE

On the 12th day of December, 1938, the same being one of the judicial days of the November, 1938, term of this court, the above entitled cause came on in its order for hearing and trial on the merits before the undersigned as presiding judge of the Equity Division of the above entitled court. The plaintiff appeared by Gamble, Read, Howland & Rosenfield, its attorneys, and the defendants appeared by John H. Mitchell, Attorney-General of the State of Iowa, Charles Bookin, Special Attorney-General and Charles W. Wilson, Assistant Attorney General.

Thereupon a trial was had and evidence offered and introduced by the parties. At the conclusion of the trial the court heard counsel in argument: and the court having considered the facts and the law and being fully and well advised in the premises, rendered and filed in this cause on, to-wit, the 21st day of December, 1938, its "Opinion", finding that on the facts and the applicable law and for the reasons as stated in said opinion the merits of this cause are with the plaintiff and that the plaintiff is entitled to a permanent injunction against the defendants in accordance with the prayer of plaintiff's petition.

[fol. 115] Now, Therefore, in conformity with said Opinion, it is Ordered, Adjudged and Decreed:

(1) That the temporary injunction heretofore granted to the plaintiff in this cause should be made permanent.

(2) That the defendants, and each of them, are permanently enjoined and restrained from doing any and each of the following acts, to-wit:

(a) Making or entering any finding or order that plaintiff has failed to comply with the purported requirements of the order of said State Board of Assessment and Review dated March 30, 1938;

(b) Making any finding that plaintiff has failed to comply with the provisions of the Iowa Use Tax Law;

(c) Revoking or canceling any sales permit issued to plaintiff covering the operation of its retail stores within the State of Iowa;

(d) Certifying or transmitting to the Secretary of State of the State of Iowa any order or finding with respect to plaintiff's alleged failure to comply with the laws of Iowa with respect to the collection of the so-called "Use Tax," or making any request upon the Secretary of State for the revocation of plaintiff's license to do business within said State as a non-resident corporation, and

(e) From taking any action for the enforcement of the so-called "order" of the Iowa State Board of Assessment and Review dated March 30, 1938, or disturbing the property or position of plaintiff with respect to its business in the State of Iowa as the result of any failure or refusal on the part of plaintiff to comply with the provisions of the so-called "Iowa Use Tax Act," as construed and applied by the defendants;

[fol. 116] insofar as such acts may be predicated upon the failure of plaintiff heretofore or hereafter to comply with the demands of the defendants for the collection by the plaintiff and/or the payment or remittance by the plaintiff of the "Use Tax" on items of merchandise sold by and through the medium of the exclusive mail order business of the plaintiff, i.e., sales identified in the record in this cause as "Type 3" Mail Order Sales.

(3) Judgment is hereby rendered in favor of the plaintiff and against the defendants and each of them for the costs of this action as taxed by the Clerk.

(4) The injunction bond filed by plaintiff in connection with the issuance of the temporary injunction is released and the surety exonerated.

The defendants duly except to all adverse rulings and to this decree.

Dated this 29th day of December, 1938.

(Sgd.) John J. Halloran, Judge.

Approved as to Form:

(Sgd.) John H. Mitchell, Charles Wilson, Charles Bookin, Attorneys for Defendants.

Thereafter the defendants perfected an appeal from the foregoing judgment and decree by serving on the plaintiff's attorneys on the 28th day of March, 1939, and by filing in the office of the Clerk of the District Court of Polk County, Iowa, on the 29th day of March, 1939, with acceptance of service endorsed thereon a

[fol. 117] NOTICE OF APPEAL

To Sears, Roebuck and Co., plaintiff, and to Gamble, Read, Howland & Rosenfield, their Attorneys:

You and each of you are hereby notified that the defendants herein have appealed to the Supreme Court of Iowa, from the final judgment in this cause and from the final order or decree herein and from each and every ruling adverse to the defendants during the progress and hearing of the said case and that said appeal will come on for hearing at the May, 1939, term of the Supreme Court of Iowa or as soon thereafter as the same can be heard in its regular order in said court.

Dated at Des Moines, Iowa, this 27th day of March, 1939.

Fred D. Everett, Attorney General of Iowa, John E. Mulroney, Assistant Attorney General of Iowa, Attorneys for Defendants.

CERTIFICATE

On the 13th day of December, A. D., 1938, there was filed in the office of the Clerk of the District Court of Polk County, Iowa, the official shorthand notes taken by the reporter in said case, containing all of the evidence offered, introduced, heard, read or received in the trial of said cause, and all objections thereto, and all rulings of the court thereon, and exceptions taken to said rulings, together with exhibits offered and introduced on the trial and made a part of the record therein, said shorthand notes, together with the exhibits and documentary evidence, being certified to [fol. 118] by Honorable John J. Halloran, Judge, and W. Scott Reiniger, official shorthand reporter.

On the 19th day of July, A. D., 1939, there was also filed in the office of the Clerk of the District Court of Polk County, Iowa, a transcript and translation of said shorthand notes, certified to by the shorthand reporter transcribing said notes as an accurate transcription of the short-

hand notes of the evidence taken in the trial of said cause by the shorthand reporter.

CERTIFICATE OF ATTORNEYS

We hereby certify that the foregoig Abstract is a full and complete abstract of the record in the foregoing cause, including abstract of all pleadings filed in said cause, together with the ruling of said court with the objections and exceptions thereto in so far as the same are material to this appeal.

Fred D. Everett, Attorney General, John E. Mulroney, Assistant Attorney General, Attorneys for Appellants.

NOTICE OF ORAL ARGUMENT

Notice is hereby given that upon the submission of this cause, the appellants will appear and argue the same orally.

Fred D. Everett, Attorney General, John E. Mulroney, Assistant Attorney General, Attorneys for Appellants.

[fols. 119-121] CERTIFICATE OF COST

We hereby certify that the cost of printing the foregoing Appellants' Abstract of Record is in the sum of $103.55.

Fred D. Everett, Attorney General, John E. Mulroney, Assistant Attorney General, Attorneys for Appellants.

[fol. 122] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 123] IN SUPREME COURT OF IOWA, SEPTEMBER TERM, 1939

9-44997. Equity

SEARS, ROEBUCK AND CO., Appellee,

vs.

LOUIS E. RODDEWIG, as Chairman of the Iowa State Board of Assessment and Review, and Individually; D. L. Murrow and C. Frank Green, as Members of the Iowa State Board of Assessment and Review, and Individually, Appellants

Appeal from District Court of Polk County, Iowa

Honorable John J. Halloran, Judge

Appellee's Amendment to Abstract of the Record—Filed October 9, 1939

[fol. 124] Appellee amends Appellants' Abstract of the Record as follows:

Amend the testimony of Harry A. Welsher, by inserting following the period after the word "Iowa" in line 6 on page 81 of the Abstract, the following: "It has been doing so for many years".

Amend the testimony of Theodore V. Houser, as follows:

By inserting after the word "mailed" in line 11, page 82 of the Abstract, the following: "to residents of the State of Iowa".

By inserting following the period after the word "orders" in line 14, page 82 of the Abstract, the following: "Sending these catalogues and bulletins is our sole means of securing business".

By inserting following the period after the word "carried" in line 17 of page 82 of the Abstract, the following: "It differs in the sense that much of the merchandise in the retail stores differs in character from that carried in the mail order plants".

By adding following the word "stores" in line 21, Abstract page 82, the following: "from which [list] each in-

dividual store makes its selection of the items it will carry in that store".

Add following the word "orders" in line 3, Abstract page 83, the following: "which are received in the mail order houses throughout the United States from residents of the State of Iowa".

Add following the word "Assuming", in line 25, Abstract [fol. 125] page 83, the following: "that neither the Chicago Mail Order House nor National Bellas Hess nor Jim Brown Fence Company has any place of business in the State of Iowa, and".

Add following the word "we" in line 1, Abstract page 84, the following: "undertake to".

Add following the word "we" in line 3, Abstract page 84, the words, "try to".

Add following the period after the word "business" in line 22, Abstract page 84, the following: "The amounts involved are not large enough to warrant the posting of those and the keeping of a record of the customers, so that we have no record by customer's name of such balance due us. Our experience is that the smaller the amount, the smaller the percentage that customers remit later."

Add to line 30, Abstract page 84, the following: "And in addition our customers, of course, would be subjected to an extra expense in making such remittance."

Add, following line 30, Abstract page 84, the following: "My last answers were predicated upon the assumption that we would put a similar notice on our catalogues which I have described as that which we are using in Illinois, requesting the customer to remit with his order the amount of the tax. If we did not put that notice on our catalogue, our collections of the use tax on shipments to residents of the State of Iowa would not exceed $35,000.00, leaving the balance uncollectible and our cost involved would be approximately $18,000.00, on the assumption that such use tax would amount to approximately $100,000.00 a year. I don't see how the use tax could be collected at all from Iowa residents if Sears, Roebuck and Co. neither request payment of the amount at the time of making the sale or if the [fol. 126] goods were shipped and delivered to the Iowa customer before any effort was made to make the collection."

Cross-examination of Theodore V. Houser:

Add following the period after the word "tax", on line 15, Abstract page 85, the following: "There is no new technique. It is merely the matter of educating hundreds of thousands of people. Just a question of time."

Add to line 26, Abstract page 85, the following: "You are not taking all the factors into account. Spiegels in Chicago and the Chicago Mail Order were also in the question. The two largest companies are Spiegels and Chicago Mail Order who are located there [in Illinois] and who employ the same method that we employ."

Redirect examination of Theodore V. Houser:

Add to line 9, Abstract page 87, the following: "They are in direct competition because we have even cooperated with such companies in a study of the amount of duplication in customers' homes. We know that there is a large percentage of duplication, and that the mail order business, more than any other type of retail business, is based on competitive prices."

Amend the testimony of Charles E. Kallal, by inserting following the period after the word "division", in line 26, Abstract page 87, the following: "It is a part of my duties [fol. 127] to ascertain the amount in money of retail sales annually effected by the retail stores of the Company located in the State of Iowa."

Amend the abstract by striking the word "case", in line 31, page 87, and inserting in lieu thereof the word "cash".

Amend the abstract by striking the words "case" and "run", in line 33, page 87, and inserting in lieu thereof the words "cash" and "rung".

Insert following the period after the word "total" in line 3, Abstract page 88, the following: "Ordinarily there is an amount included in a remittance to cover transportation charges on the goods ordered."

Add following the period after the word "shortage" in line 6, Abstract page 88, the following: "As long as I have known Sears, Roebuck they have employed that practice in an effort to collect deficiencies of that sort. They are not able to make all of those collections. Experience has shown us that approximately of the 'due us's'—those amounts less than twenty-five cents—we receive approximately 36%,

whereas of the larger amounts, approximately 70% to 75% is collected."

Add preceding the period following the word "department", in line 18, Abstract page 88, the following: "in the State of Iowa".

Add after the period following the figures "2,250,000", in line 23, Abstract page 88, the following: "The aggregate of the three was approximately $5,900,000."

Strike the word "case", in line 29, Abstract page 88, and insert in lieu thereof the word "cash".

[fol. 128] CERTIFICATE

We hereby certify that the foregoing Amendment to the Abstract of the Record is true and correct, and that said Amendment is necessary to a full understanding of the facts and the questions presented to the Court for decision. That the Appellants' Abstract of the Record, as amended by Appellee's Amendment is a true, full, and correct abstract.

Gamble, Read, Howland & Rosenfield, Attorneys for Appellee.

NOTICE OF ORAL ARGUMENT

Notice is hereby given that upon the submission of this cause, the appellee will appear and orally argue the same.

Gamble, Read, Howland & Rosenfield, Attorneys for Appellee.

COST CERTIFICATE

We hereby certify that the cost of printing the foregoing Amendment to the Abstract of the Record, and the amount actually paid therefor was the sum of $7.00.

Gamble, Read, Howland & Rosenfield, Attorneys for Appellee.

[fol. 129] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 130] In Supreme Court of Iowa, January Term, 1940
Term, 1940

Equity

Sears, Roebuck and Co., Appellee

vs.

Louis E. Rodenwig, as Chairman of the Iowa State Board of Assessment and Review, and Individually; D. L. Murrow and C. Frank Green, as members of the Iowa State Board of Assessment and Review, and Individually, Appellants

Appeal from District Court of Polk County, Iowa, Honorable John J. Halloran, Judge

Opinion of the Court—Filed May 14, 1940

[fol. 131] Suit in equity to enjoin the defendants, as members of the State Board of Assessment and Review, from undertaking to cancel plaintiff's permit to do business in Iowa for failure to pay a use tax on mail order sales made by plaintiff outside of Iowa. The court granted the injunction. Defendants appeal.—Affirmed.

Miller, J:

The plaintiff's petition asserts that it is a non-resident corporation licensed to do business in the State of Iowa. Pursuant to such license, it has established and is now conducting various retail stores in Iowa which constitutes a substantial investment on its part. It has reported to and paid the State Board of Assessment and Review the amount of the tax due on all sales made in Iowa through the operation of such retail stores. In addition to the business conducted in Iowa, it has for many years and is now conducting a mail order business through mail order stores or establishments, all of which are located outside of Iowa. The orders from customers in Iowa are sent to such stores by mail, are there filled, and the merchandise shipped to the purchasers in Iowa. Plaintiff has not collected nor paid a use tax on such mail order sales made outside of Iowa to customers residing in Iowa. There are numerous firms who maintain no place of business in Iowa who conduct a mail order business with residents of Iowa in competition with plaintiff, who

are not required to and do not collect the use tax on sales made by them. The defendants, acting as the State Board of Assessment and Review, construed the statute as authorizing and empowering them to require plaintiff to collect [fol. 132] the use tax on mail order sales made and consummated outside of Iowa with customers located in Iowa. The Board adopted a resolution, threatening to cancel plaintiff's license as a retailer and its permit to do business in Iowa for failure to collect and pay the use tax on mail order sales made outside of Iowa to residents of Iowa.

Plaintiff asserted that the statute, insofar as it purports to authorize such procedure by the board, is unconstitutional in violation of Sections 8 and 10 of Article I of the United States Constitution, and Section 1 of the 14th Amendment to such Constitution, and is also an attempt on the part of the State of Iowa to make its laws operate extraterritorially. Plaintiff prayed that the board be enjoined from finding that it has failed to comply with the use tax law and from taking any steps to secure the cancellation of its license as a retailer or its permit to do business in Iowa and for general equitable relief.

A hearing was had and the court granted a temporary injunction restraining the defendants from making any finding that plaintiff had failed to comply with the provisions of the use tax law, or taking any steps to secure the revocation of plaintiff's license as a retailer or permit to do business as a non-resident corporation.

The defendants filed an answer admitting all allegations of the petition not specifically denied, modified or qualified. Defendants asserted that the state has the power and authority to adopt the use tax law and make it applicable to plaintiff's mail order business as a condition to its right to continue to do business in Iowa. Various allegations of the petition are denied. The effect of the answer, however, was primarily to put in issue the constitutional questions presented by the allegations of the petition.

[fol. 133] At the trial, it was stipulated that the plaintiff, in the conducting of its business, made sales of tangible personal property to residents or persons within the State of Iowa, by three methods, referred to as types. Type I involves sales made in its retail stores located in Iowa, which sales are subject to the Iowa sales tax. Type II involves special order sales wherein the purchaser orders from one of plaintiff's retail stores in Iowa tangible property not car-

ried in stock by the store, but carried by one of the mail order establishments located outside of Iowa; the order is given to the local store with the purchase price, which includes transportation charges; the store orders the shipment to be made direct to the purchaser from a mail order establishment, where the order is filled charging the local store with the cost price, plus overhead and transportation charges; the purchase price paid to and received by the local store is retained by it and included in the volume of its gross sales. Type III involves mail order sales. A person or resident of Iowa prepares his order, or has it prepared for him, sends it to one of plaintiff's mail order establishments located outside of Iowa, with a remittance of the purchase price, plus transportation charges, specifying the means of transportation; the order is accepted or refused at the mail order establishment; if accepted, the order is filled by direct shipment to the purchaser through the United States mail, or some common carrier specified by the purchaser.

It was stipulated for the purposes of this case that plaintiff is obligated to collect and has collected and paid the tax imposed upon all sales made by it to residents of Iowa classified as Types I and II, but that as to Type III, mail order sales, it failed and refused to collect the use tax imposed by the use tax act.

[fol. 134] There was testimony as to the activities of various competitors of plaintiff, engaged in mail order business without maintaining any place of business in Iowa. There was also testimony regarding the difficulty of collecting a use tax on mail order sales made to persons in Iowa through the mail order establishments of plaintiff located outside of Iowa. We do not undertake to review this testimony because we do not think it has any substantial bearing upon the questions to be decided by us.

The court held that the use tax law, insofar as it purports to authorize the defendants to insist upon plaintiff collecting and paying the use tax on mail order sales made to persons in Iowa through the mail order establishments located outside of Iowa, is unconstitutional and void, being contrary to Section 8 of Article I of the Constitution of the United States, and Section 1 of the 14th Amendment thereto. A permanent injunction was granted restraining defendants from making any finding that plaintiff has failed to comply with the provisions of the Iowa

use tax law or taking any action to secure the revocation or cancellation of its sales permit covering the operation of its retail stores in Iowa or its license to do business as a foreign corporation in this state. From this decree defendants have appealed.

The statute involved herein was enacted as Chapter 198 of the Acts of the 47th General Assembly. Some amendments were adopted by Chapters 175 and 182 of the Acts of the 48th General Assembly. The statute, as amended, appears as Chapter 329.4 of the Code, 1939. The amendments do not appear to materially affect the questions presented by this litigation, and we will refer to the statute as it appears in the Code, 1939.

Section 8 of the Act (Section 643.109 of the Code, 1939) provides that every retailer maintaining a place of busi- [fol. 135] ness in this state and making sales of tangible property for use in this state, not exempt under Section 6943.104, exempting sales on which the sales tax is paid or by Section 6943.107, having reference to motor vehicles, "shall at the time of making such sales, whether within or without the state, collect the tax imposed by this chapter from the purchaser." Section 11 of the Act (Section 6943.112 of the Code) provides that the tax, required to be collected by the retailer and any tax collected by the retailer pursuant to said Section, shall constitute a debt owed by the retailer to the state. Section 21 of the Act (Section 6943.122 of the Code) provides that, whenever the retailer maintaining a place of business in this state is a corporation authorized to do business in this state and fails to comply with the provisions of the chapter, a certificate may be made to the secretary of state of a finding that such retailer has failed to comply with such provisions, and the secretary of state shall, upon receipt of such certificate, revoke the permit authorizing the corporation to do business in this state, and shall issue a new permit only when the corporation shall have obtained an order finding that it has complied with its obligations under the chapter.

The question presented is whether Section 6943.109, requiring plaintiff to collect the tax on mail order sales made without the state, is constitutional when considered with the provision that, under Section 6943.112, the tax, collected or required to be collected, is a debt of plaintiff, and, upon a finding that plaintiff has failed to pay such

debt, under Section 6943.122, plaintiff's permit to do business as a foreign corporation in this state must be revoked. We are of the opinion that the court correctly held that the provisions of the chapter, as applied to the mail order sales shown by the record herein, are unconstitutional and, therefore, void.

[fol. 136] If the plaintiff limited its activities to conducting a mail order business such as shown by the record herein, it would not be doing business in this state and the state could not require it to secure a license to do business here. Ryerson & Son v. Schraag, 211 Iowa 558, 561 to 563, 229 N. W. 733; Anderson Bros. v. Sioux Monument Co., 210 Iowa 1226, 1231, 232 N. W. 689. With plaintiff's activities so limited, it would not be conducting a retail business in Iowa, and, therefore, would not be subject to the requirements of Section 6943.109. Defendants contend, however, that when plaintiff undertakes to do a retail business here, under a permit issued by the secretary of state, the state has the right to attach, as a condition to plaintiff's right to do business here, a requirement that it collect the use tax on sales made outside of Iowa, as to which sales plaintiff otherwise would have no obligation to this state. The court found otherwise, and correctly so.

Defendants contend that the tax is a tax upon the use of property in this state, is really a tax upon the purchaser and is not a tax upon the plaintiff at all. Perhaps from a subtle and technical standpoint this may be true, but, if true, it is unimportant. Section 6943.109 requires that the tax be collected when the sale is made. Under the facts herein, the property is then without the state. Section 6943.112 makes the amount of the tax a debt owed by plaintiff and Section 6943.122 provides that a failure to pay that debt shall constitute proper grounds for revoking plaintiff's permit to do business in this state. From any reasonable or practical standpoint, the amount of the tax being made a debt of plaintiff, the statute at least constitutes regulation of plaintiff's activities outside the state as a condition to it being granted a license to do business in the state. This cannot be done.

[fol. 137] In the case of Conn. Gen. Life Ins. Co. v. Johnson, 303 U. S. 77, 80; 58 S. Ct. 436, 82 L. ed. 673, the court, through Justice Stone, states:

"But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 S. Ct. 36, 4 Ann. Cas. 493; New York L. Ins. Co. v. Head, 234 U. S. 149, 58 L. ed. 1259, 34 S. Ct. 879; New York L. Ins. Co. v. Dodge, 246 U. S. 357, 62 L. ed. 772, 38 S. Ct. 337, Ann. Cas. 1918E, 593; St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346, 67 L. ed. 297, 43 S. Ct. 125; Compania General de Tabacos v. Collector of Internal Revenue, 275 U. S. 67, 72 L. ed. 177, 48 S. Ct. 100; Home Ins. Co. v. Dick, 281 U. S. 397, 74 L. ed. 926, 50 S. Ct. 338, 74 A. L. R. 701; Hartford Acci. & Indem. Co. v. Delta. & P. Land Co., 292 U. S. 143, 78 L. ed. 1178, 54 S. Ct. 634, 92 A. L. R. 928; Boseman v. Connecticut General L. Ins. Co., 301 U. S. 196, 81 L. ed. 1036, 57 S. Ct. 686, 110 A. L. R. 732; People ex rel. Sea Ins. Co. v. Graves, 274 N. Y. 312, 8 N. E. (2d) 872."

In the case of Union Refr. Transit Co. v. Kentucky, 199 U. S. 194, 204, 50 L. ed. 150, 26 S. Ct. 36, 4 Ann. Cas. 493, the court states:

"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the [fol. 138] taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state receives none of the protection for which the tax is supposed to be the compensation."

In the case of New York Life Ins. Co. v. Dodge, 246 U. S. 357, 375, 62 L. ed. 772, 38 S. Ct. 337, Ann. Cas. 1918E, 583, the court states:

"Assuming the policy to be a Missouri Contract, we declared that state without power to extend its authority over citizens of New Mexico and into New York and forbid the later agreement there made simply because it modified the first one. We said: 'It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state and in the state of New York, and there destroy freedom of contract without throwing down the constitutional barriers by which all the states are restricted within the orbits of their lawful authority and upon the preservation of which the government, under the Constitution, depends.' "

In the case of New York Life Ins. Co. v. Head, 234 U. S. 149, 164, 58 L. ed. 1259, 34 S. Ct. 879, the court, through Chief Justice White, states:

"It is true it has been held that, in view of the power of a state over insurance, it might, as a condition of a license given to a foreign insurance company to do business within its borders, impose a condition as to business within the state, which otherwise, but for the complete power to exclude, would be held repugnant to the Constitution. In other words, that a company having otherwise no right whatever, for any purpose, to go in without a license, would not be heard, after accepting the same, to complain of exactions upon which the license was conditioned as unconstitutional, because of its voluntary submission to the same. But even if it be put out of view [fol. 139] that this doctrine has been either expressly or by necessary implication overruled, or, at all events, so restricted as to deprive it of all application to this case (see Harrison v. St. Louis & S. F. R. Co., 232 U. S. 318, 332, 58 L. ed. 621, 625, 34 Sup. Ct. Rep. 333, and authorities there cited), it here can have no possible application since such doctrine, at best, but recognized the power of a state, under the circumstances stated, to impose conditions upon the right to do the business embraced by the license, and therefore gives no support to the contention here presented, which is that a state, by a license, may acquire the right to exert an authority beyond its

borders which it cannot exercise consistently with the Constitution. But the Constitution and its limitations are the safeguards of all the states, preventing any and all of them, under the guise of license or otherwise, from exercising powers not possessed."

In the case of Home Ins. Co. v. Dick, 281 U. S. 397, 407; 74 L. ed. 926, 50 S. Ct. 338, 74 A. L. R. 701, the court, through Justice Brandeis, states:

"Second. The Texas statute as here construed and applied deprives the garnishees of property without due process of law. A state may, of course, prohibit and declare invalid the making of certain contracts within its borders. Ordinarily, it may prohibit performance within its borders, even of contracts validly made elsewhere, if they are required to be performed within the state and their performance would violate its laws. But, in the case at bar, nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of reinsurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by Dick in the bringing of this suit. The fact that Dick's permanent residence was in Texas [fol. 140] is without significance. At all times here material, he was physically present and acting in Mexico. Texas was, therefore, without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law. Compania General de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U. S. 87, 72 L. ed. 177, 48 Sup. Ct. Rep. 100; Aetna L. Ins. Co. v. Dunken, 266 U. S. 328, 69 L. ed. 342, 45 Sup. Ct. Rep. 129; New York L. Ins. Co. v. Dodge, 246 U. S. 357, 62 L. ed. 772, 38 Sup. Ct. Rep. 337, Ann. Cas. 1918E, 593."

In the case of Hartford Acci. & Ind. Co. v. Delta & P. Land Co., 292 U. S. 143, 78 L. ed. 1178, 54 S. Ct. 634, 92 A. L. R. 928, the court, through Justice Roberts, states:

"The Mississippi statutes, so construed, deprive the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory (Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 15 S. Ct. 207, 5 Inters. Com. Rep. 610; Orient Ins. Co. v. Daggs, 172 U. S. 557, 565, 566, 43 L. ed. 552, 555, 556, 19 S. Ct. 281; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 398, 399, 44 L. ed. 1116, 1123, 1124, 20 S. Ct. 962); but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. New York L. Ins. Co. v. Head, 234 U. S. 149, 58 L. ed. 1259, 34 S. Ct. 879; Aetna L. Ins. Co. v. Dunken, 266 U. S. 389, 399, 69 L. ed. 342, 349, 45 S. Ct. 129. Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. Home Ins. Co. v. Dick, 281 U. S. 397, 407, 408, 74 L. ed. 926, 933, 934, 50 S. Ct. 338, 74 A. L. R. 701."

[fol. 141] In the case of St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346, 349, 43 S. Ct. 125, 67 L. ed. 297, the court, through Justice Holmes, states:

"It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside."

In the case of James v. Dravo Contracting Co., 302 U. S. 134, 139, 58 S. Ct. 208, 82 L. ed. 155, the court, through Chief Justice Hughes, states:

"It is clear that West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work done in Pennsylvania. As to the material and equipment there fabricated, the business and activities of respondent in West Virginia consisted of the installation at the respective sites within that state and an apportionment would in any event be necessary to limit the tax accordingly, Hans Rees' Sons v. North Carolina, 283 U. S. 123, 75 L. ed. 870, 51 S. Ct. 385, supra."

In the case of Baldwin v. Seelig, 294 U. S. 511, 521, 55 S. Ct. 497, 79 L. ed. 1032, the court, through Justice Cardozo, states:

"New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there. So much is not disputed. New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. This again is not disputed. Accepting those postulates, New York asserts her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers of Vermont is less than would be owing in like circumstances to farmers in New York. The importer in that view may keep his milk or drink it, but sell it he may not.

[fol. 142] "Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. * * *

"If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."

Other cases might be cited and quoted from. To do so would unduly prolong this opinion. The foregoing, in our judgment, demonstrate that the position taken by the Supreme Court of the United States in construing the constitution is such that the decree herein must be affirmed. The State of Iowa has the right to control and tax the property and activities of the plaintiff within its boundaries. It may also control and tax such property and activities as a condition to permitting plaintiff to do business as a foreign corporation here. But it has no power to regulate plaintiff's activities outside this state, nor has it the power to regulate such activities as a condition to plaintiff's right to continue to do business here.

The only activities of plaintiff involved herein are the sales made pursuant to its mail order business. As to all other activities, for the purposes of this case, plaintiff concedes that the tax must be paid and it has been collected and paid. The mail order sales, however, do not constitute activities within the State of Iowa, nor do such sales constitute doing business within the state. The sales are con-

summated outside the State of Iowa in each instance. They are separate and distinct from plaintiff's activities in Iowa. The statute here challenged seeks to impose upon plaintiff the obligation that it "shall at the time of making such sales, whether within or without the state, collect the tax [fol. 143] imposed by this chapter from the purchaser." The sales are made outside of Iowa and the statute requires plaintiff to collect the tax at the time the sales are made. It clearly seeks to regulate activities of plaintiff outside the state. Under the provisions of Section 6943.122, defendants seek to cancel plaintiff's license as a retailer in this state and its permit to do business here as a foreign corporation for failure to pay a debt which constitutes a regulation of its activities outside of Iowa. Under repeated pronouncements of the Supreme Court of the United States, hereinbefore reviewed and quoted from, the State of Iowa has no such right. The court correctly so held.

Defendants contend, however, that recent decisions of the Supreme Court of the United States demonstrate that the precedents herein reviewed and followed have been overruled and are no longer to be considered interpretations of the Constitution of the United States. We are unable to agree with such contentions.

The case of Monamotor Oil Co. v. Johnson, 292 U. S. 86, 78 L. ed. 1141, 54 S. Ct. 575, involved the collection of a use tax in Iowa. However, the fact situation was very different from that presented by the record herein. At page 90 of 292 U. S., Justice Roberts states the facts as follows:

"The appellant is an Arizona corporation whose business is the buying, manufacturing, blending and selling of gasoline and kindred products, including the importation into Iowa of gasoline by tank cars, trucks and other containers, for resale to consumers and to dealers who sell to consumers, and the exportation of gasoline to other states; the maintenance of storage facilities in Iowa, from which deliveries are made in that and other states, and the maintenance of a refinery at Carter Lake, Iowa, where gasoline is blended and compounded and shipped to points in Iowa and [fol. 144] other states. Prior to April, 1932, gasoline was refined at this plant. The corporation maintains numerous service stations in Iowa which sell to consumers."

It will be noted from the above statement of facts that the use tax which the appellant was required to collect pertained

to gasoline and kindred products sold and delivered by it in connection with its activities within the State of Iowa. The question presented for our consideration was not involved in that decision.

The case of Wiloil Corp. v. Pennsylvania, 294 U. S. 169, 79 L. ed. 838, 55 S. Ct. 358, was similar to the Monamotor Oil Co. case. The facts involved in that case are stated by Justice Butler, at page 172 of 294 U. S., as follows:

"Appellant, a Pennsylvania corporation having its principal place of business in Pittsburgh, sells liquid fuels at wholesale and is a distributor as defined by the act. The tax in controversy was laid at three cents per gallon upon the contents of 13 tank cars sold and delivered by it. All were ordered through its agent in Philadelphia for delivery to purchasers at that city or at Essington, Pennsylvania. The orders specified a price per gallon 'f. o. b. Wilmington, Del., plus 3c tax,' and were subject to, and received, appellant's approval at its office in Pittsburgh."

From the foregoing quotation, it will be noted that the tax involved in that case pertained to activities of appellant within the state of Pennsylvania.

The case of Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 412, 81 L. ed. 1193, 57 S. Ct. 772, involved a tax upon chain stores located in and operated by the Great Atlantic & Pacific Tea Company in the State of Louisiana. The property was located in and the activities were conducted in the taxing state.

[fol. 145] The case of Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62, 83 L. ed. 488, 59 S. Ct. 376, involved the collection of a use tax on property sold by the appellant through its general agents, who were doing business in the State of California. In setting forth the facts, Justice McReynolds quotes from the statement made by the lower court in 23 Fed. Supp. 186, as follows:

"That each of these two general agents maintains an office in this state, the lease to such office designating the plaintiff as lessee therein, the rent for the same being paid by plaintiff, while all other expenses of maintaining such office are paid by the general agent. As soon as an order is accepted a particular machine is appropriated for that purpose in plaintiff's shipping department in Illinois. All machines sold for delivery in California are shipped from

one of plaintiff's distributing points outside of the state. Sometimes machines are forwarded directly to the purchasers, while in other instances, in order to secure reduced freight charges, large groups of machines are shipped to the general agent who makes delivery to the respective purchasers."

It will be noted from the above quotation that the sales involved were solicited by agents in California, and in many instances the deliveries were made by the same agent in California. The tax, therefore, pertained to activities of the appellant through its general agents and their subagents, who were undertaking to do business for appellant in the State of California.

The case of Henneford v. Silas Mason Co., 300 U. S. 577, 81 L. ed. 814, 57 S. Ct. 524, did not involve the vendor of personal property at all. It sustained a tax levied by the State of Washington against the owner of machinery and other property brought into the State of Washington and then being used in connection with the construction of the [fol. 146] Grand Coulee dam. The question there presented was entirely different than that which now confronts us.

The recent case of McGoldrick v. Berwind-White Coal Mining Co., decided January 29, 1940, sustains a tax levied by the City of New York on sales made in the City of New York. The products were sold and delivered in that city. The tax pertained to activities within the jurisdiction of the taxing body.

By reason of the foregoing, we are satisfied that the recent decisions of the Supreme Court of the United States, cited to us by defendants, do not involve the question that confronts us and the decisions do not overrule the precedents which we consider controlling here.

Our position is somewhat fortified by the recent case of McCarroll v. Dixie Greyhound Lines, decided February 12, 1940. The opinion was delivered by Justice McReynolds. Chief Justice Hughes, Justice Roberts, Justice Reed and Justice Stone concurred specially in an opinion prepared by Justice Stone. The court held that an Arkansas statute which prohibited entry into the state of any automobile or truck carrying over 20 gallons of gasoline until the state tax thereon of 6½ cents per gallon had been paid, was unconstitutional as applied to certain busses operated by the appellee in the states of Tennessee, Arkansas and Missouri. The opinion of Justice McReynolds states as follows:

"The often announced rule is that while generally a state may not directly burden interstate commerce by taxation she may require all who use her roads to make resonable compensation therefor. Hendrick v. Maryland, 235 U. S. 610, 622; Interstate Transit, Inc., v. Lindsey, supra, 185, 186; Bingaman v. Golden Eagle Western Lines, 297 U. S. 626, 628.

"Here, the revenue officer demanded payment of appellee on account of gasoline to be immediately transported over [fol. 147] the roads of Arkansas for consumption beyond. If, considering all the circumstances, this imposition reasonably can be regarded as proper compensation for using the roads it is permissible. But the facts disclosed are incompatible with that view."

The concurring opinion of Justice Stone states as follows:

"Since the subject taxed, gasoline introduced into the state in the tank of a vehicle, for use solely in propelling it in interstate commerce, is immune from state taxation except for a limited state purpose, the exaction of a reasonable charge for the use of its highways, it is not enough that the tax when collected is expended upon the state's highways. It must appear on the face of the statute or be demonstrable that the tax as laid is measured by or has some fair relationship to the use of the highways for which the charge is made. Sprout v. City of South Bend, 277 U. S. 163, 170; Interstate Transit, Inc., v. Lindsey, 283 U. S. 183, 186; Bingaman v. Golden Eagle Western Lines, 297 U. S. 626, 628; Morf v. Bingaman, 298 U. S. 407; Ingels v. Morf, 300 U. S. 290, 294."

Justice Stone concludes as follows:

"There are ways enough in which the state can take its lawful toll without any suppression of the commerce which it taxes. In laying an exaction as a means of collecting compensation for the use of its highways the state must tax the commerce as it is done, and not as it might be done if the state could control it. Appellant cannot justify an unlawful exaction by insisting that it would be lawful if the taxpayer were to relinquish some of the commerce which the Constitution protects from state interference."

While the question presented in the case last quoted from is different than the question that now confronts us, it seems apparent that the decision there made was prompted by

[fol. 148] some of the principles of law which are recognized and applied in the precedents which we deem controlling here. Accordingly, the decision strengthens our conviction that such precedents have not been overruled and are still binding upon us. The decree appealed from is in accord with such precedents. It must be and it is—Affirmed.

Sager, Hale, Bliss and Oliver, J. J., concur.

Hamilton, C. J., and Mitchell, Richards and Stiger, J. J., dissent.

DISSENTING OPINION

MITCHELL, J., dissenting:

I find myself unable to agree with the majority and respectfuly dissent.

This is not a case in which there is a tax on interstate commerce, nor is there any unreasonable burden placed upon the Sears Roebuck Company. The sole question is whether the State of Iowa can say to this corporation, that before Iowa will permit the corporation to do business in Iowa, it must collect and report the Use Tax, which is a tax on the purchaser.

In the recent case of Ford Motor Company v. Beauchamp, 60 S. Ct. 273, the Supreme Court of the United States speaking through Mr. Justice Reed said:

"The statute calls the excise a franchise tax. It is obviously payment for the privilege of carrying on business in Texas. There is no question but the State has the power to make a charge against domestic or foreign corporations for the opportunity to transact this intrastate business. The exploitation by foreign corporations of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations. In laying a local privilege tax, the state sovereignty may place a charge upon that [fol. 149] privilege for the protection afforded. When that charge, as here, is based upon the proportion of the capital employed in Texas, calculated by the percentage of sales which are within the state, no provision of the Federal Constitution is violated."

In the case at bar, it is not a tax or an unreasonable burden, and if the corporation desires the privilege of doing business in Iowa, they must comply with the requirement

of the law as far as the Use Tax is concerned or the State of Iowa can properly refuse to grant the corporation the permit to do business in Iowa.

I would reverse the case.

DISSENTING OPINION

HAMILTON, C. J., dissenting:

Being unable to concur in the majority opinion, I respectfully dissent.

The Iowa Use Tax Act, imposing a two per cent tax upon the use of tangible personal property, was enacted by the General Assembly of Iowa (Chapter 198, 47th G. A.) at its 47th Session held in 1937, and is complementary to the Retail Sales Tax Act, imposing a two per cent tax upon the gross receipts from sales at retail, (Chapter 196, 47th G. A.) passed at the same session of the Legislature. The Use Tax Act provides for exemption from the tax when the property has already been subjected to a tax on sales or use by any other state equal to or greater than the use tax imposed by the Iowa law. By Section 8 of the Act:

"Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state, (not exempt) * * * shall at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser, * * *"

[fol. 150] By Section 11, the tax required to be collected and any tax collected by any retailer "shall constitute a debt owed by the retailer to this state." Other provisions of the Use Tax Act provide for making returns and remittance of the tax imposing penalties, etc., none of which are material in the consideration of the questions here involved.

The theory of the majority opinion, as I understand it, is based on this formula: The property, which the mail order house, appellee, is selling to Iowa users, is situated outside of the State of Iowa; the sale is consummated outside of the State of Iowa; hence, to require the seller to collect the tax at the time of the sale is an attempt to regulate an out-of-state activity which is forbidden by the 14th Amendment to the United States Constitution.

This is exactly the set up which existed in the case of Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62, 83

L. ed. 488, 59 S. Ct. 376, in which case the court upheld the California law, the collection feature of which is identical with that of the Iowa Use Tax Act. Appellee attempts to differentiate between the Felt & Tarrant Mfg. Co. case and the instant case and further contends that the issue of extraterritoriality involved in the instant case was not raised, argued or decided in the California case. We disagree with counsel for appellee. Mr. Justice McReynolds, who has never been accused of being unable to clearly express himself, states the issues as follows:

"Appellant seeks an injunction prohibiting the state officers from enforcing against it the California Use Tax Act of 1935. (Cal. Stat. 1935, Chap. 361, as amended by Cal. Stat. 1937, Chaps. 401, 671 and 683.) Counsel do not question the right of the state to collect this tax from the user, etc., but they say that, in the circumstances here disclosed, the officers may not compel appellant *to serve as an agent for collecting the tax* as they are threatening to do." (Italics ours.)

[fol. 151] This is exactly the contention which appellee, in the instant case, is now making. From a reading of the opinion, it will be noticed that appellant was an Illinois corporation, engaged in manufacturing comptometers in that state and delivering these to purchasers in various states of the Union. Its method of doing business is set forth in the opinion. Mr. Justice McReynolds states, in the following paragraph taken from the opinion, what the argument was:

"The argument is this—

"The appellant, an Illinois corporation, carried on no intrastate operations in California and is not subject to its jurisdiction. Such business as it transacts in California is interstate in character. California, therefore, lacks the power to require it (1) to act as the state's collecting agent with respect to use tax which may become due from California storers, users or consumers, or (2) to insure payment of such tax if it fails to make collections from the tax debtors, or (3) otherwise to act as a 'retailer' as defined by the Act and the appellees. The treatment of the appellant as a retailer subject to the provisions of the California Use Tax Act is a direct burden upon interstate commerce prohibited by the Federal Constitution.

Numerous provisions of the statute, if applied, would deprive appellant of its property without due process of law."

The foregoing, in substance, is the argument now made to this court in the instant case. In deciding the California case, the United States Supreme Court simply said:

"The trial court thought that both contentions were foreclosed by what was said and ruled in Bowman v. Continental Oil Co., 256 U. S. 642, 650, 65 L. ed. 1139, 1145, 41 S. Ct. 606; Monamotor Oil Co. v. Johnson, 292 U. S. 86, 93, 95, 78 L. ed. 1141, 1147, 1148, 54 S. Ct. 575; and Henneford v. Silas Mason Co., 300 U. S. 577, 582, 583, 81 L. ed. 814, 818, 819, 57 S. Ct. 524. And we agree with that conclusion."

[fol. 152] It will be noticed that, in the California case, the out-of-state corporation was not even qualified to do intrastate business in California. It was not licensed as a retailer but the Federal Court held that, in maintaining two offices in the state, it came within the definition of "retailer" as defined by the California Use Tax Act. The orders taken were required to be submitted to and approved by the plaintiff corporation in Illinois. All sales and deliveries were required to be made by the plaintiff corporation. The general agents, domiciled in California, were prohibited from making collections, and all payments for goods ordered were required to be made directly to the plaintiff. Some of the goods were shipped direct to purchasers in California; others were shipped to the general agents, to save freight, who, in turn, delivered them to the purchasers. In so far as the activity of collecting the tax is concerned, it would necessarily have to be as completely an out-of-state activity as in the instant case. There was no sale in California; the agents were merely solicitors of orders; the orders were sent by mail to be accepted by the company in Illinois; purchase price was to be paid in Illinois and the goods shipped directly from Illinois to the purchaser. Only the machine used in demonstration was in California. We can see no material distinction in principle between the Felt & Tarrant Mfg. Co. case and the instant case.

We do think the facts in the instant case in support of the regulatory means of collecting the tax are stronger than those in the California case. In the instant case, Iowa has granted the appellee two privileges: (1) the privilege of

doing business as a foreign corporation, and (2) the privilege of operating a retail merchandising business within the state. These privileges granted furnish a more substantial basis for upholding and sustaining the burden im- [fol. 153] posed than anything appearing in the California case.

Appellee points out the activities of the two general agents soliciting orders in California and of the delivery of some of the machines by the agents to the purchasers as distinguishing features from the mail order sales involved in the instant case. Counsel is overlooking the fact that the regulatory provision for collecting the tax at the time of making the sale in Illinois is just as much an out-of-state activity. The purchase price was paid not to the agent but to the Illinois corporation which, under the California law, was required to collect the tax. Counsel is also wrong in saying there is no intrastate activity on the part of appellee in connection with the mail order business. The intrastate activities, in connection with mail order sales, consist first in the activity of the retailer, appellee, soliciting business from Iowa residents by means of distribution of large and small catalogues and special sales bulletins; by this means appellee displays its merchandise, its prices and gives its sales talk to the Iowa customers; by this means it made, in 1937, 1,200,000 sales to Iowa residents. The activity of the purchaser within the State of Iowa consisted of making out the order, enclosing the purchase price, the carrying charges (and the requisite tax, if the law was obeyed), and placing the order in the mail and, after receipt of the goods, making use of same. The fact that the appellee, in distributing its catalogues, makes use of the express company or the United States mail instead of using its own motor trucks and making a house-to-house personal delivery of the catalogues does not make its conduct in this respect any less an activity within the state. Other activities within the State of Iowa, which obviously may be necessary, are—making adjustments in case of damaged, soiled, misfit or [fol. 154] defective merchandise, or in the exchange of the merchandise, for any reason, which might require, in the adjustment, return of a portion of the purchase price paid; as to its credit or installment business, it might even require court action to repossess the property.

Activities, similar to the above, which are obvious were taken into consideration by the court in Equitable L. Assur. Soc. v. Pennsylvania, 238 U. S. 147, 59 L. ed. 1239, 35 S. Ct. 829, wherein Justice Holmes, in expresing the views of the court, said:

"It is obvious that many incidents of the contract are likely to be attended to in Pensylvania, such as payment of dividends when received in cash, sending an adjuster into the state in case of dispute, or making proof of death."

Similar obvious activities were given consideration by Chief Justice Taft in the second division of the opinion in Compania General de Tobacos v. Collecter of Internal Revenue, 275 U. S. 98, 72 L. ed. 182, 48 S. Ct. 100. Justice Stone, in the opinion in the case of Connecticut Gen. L. Ins. Co. v. Johnson, 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436,—which case is strongly relied upon in the majority opinion in the instant case,—calls attention to the last two cited cases distinguishing them from the Johnson case. In the Johnson case, the reinsurance contracts involved were entirely out-of-state transactions. By its terms it called for no act in California. No act in the course of their formation, performance, or discharge took place there. The contracts were made in Connecticut; the premiums were payable there; the adjustment and payment of losses took place in Connecticut and the court said:

"* * * there is no basis for saying that reinsurance which does not run to the original insured, and which from [fol. 155] its inception to its termination involves no action taken within California, even the settlement and adjustment of claims, is embraced in any privilege granted by that state."

We have no quarrel with the Johnson case. In discussing the 14th Amendment, Justice Stone, in the Johnson case, states:

"As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it."

When we examine the Iowa Use Tax Act, we find the "objects" to be tangible personal property. The incident

of the tax is the use of this property within the State of Iowa by the purchaser whether purchased within or without the state. Obviously, both the objects of the tax and the incident of the tax are within the boundaries of the State of Iowa. The Use Tax being a tax against the purchaser-user within this state, the power to lay the tax is within the orbit of state power. This the appellee is forced to concede, under all the holdings of the United States Supreme Court. But they say, even so, yet, when it comes to the matter of collecting the tax from Iowa persons using the property purchased from appellee through the mail order system, that Iowa may not require the Illinois corporation, as a condition to its right or privilege of continuing to conduct its business in this state, to assist the state authorities in the collection of the tax and that to require it to do so is an invasion of the due process clause of the Federal Constitution. The same contention was made in the case of Monamotor Oil Co. v. Johnson, supra, and in disposing of this feature, Justice Roberts, speaking for the court, said:

[fol. 156] "Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement. * * * and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant.

"The method of imposition and collection of the tax does not deny the equal protection of the laws guaranteed by the Fourteenth Amendment." (Italics ours.)

In the case of Henneford v. Silas Mason Co., supra, the United States Supreme Court had under consideration the Use Tax Act of the State of Washington, which is very similar to the Iowa Use Tax Act. The extraterritorial feature presented in the instant case was not involved in the Henneford case; however, the opinion written by the late eminent Mr. Justice Cardozo does contain a very masterful, general analysis of the Use Tax Law and to our mind is a complete answer to every contention relied upon by appellee other than the so-called extraterritorial issue. See also the recent case: Osborn v. Ozlin, U. S.

Supreme Court filed April 27, 1940, opinion by Mr. Justice Frankfurter.

The Iowa Use Tax is not laid upon property outside state boundaries nor upon the sale of property made outside the state nor can it be said that the tax is upon any privilege exercised and enjoyed by appellee in other states. Contra, the tax is laid on the privilege of use within the state, and the incidental burden of collecting the tax is upon the privilege granted by the state to appellee,—a privilege actually made use of—, to engage in the retail business within the state. The place of making the sale [fol. 157] has no connection with the duty of collecting the tax. The same duty applied to all retailers within the state no matter where the sale is made. The state in effect constitutes the retailer its agent for the purpose of collecting from the source, to-wit, the purchaser, the tax which admittedly the purchaser-user owes the state. The state says to each retailer:

"In consideration of the right or privilege of engaging in the retail business in Iowa, you must aid the state in its administration of the law by performing this incidental duty of collecting the tax at the time of making the sale."

The difficulty of enforcing the tax provisions, in any other manner, would seem to be insurmountable; hence, the duty imposed of aiding the state in administering the law follows natural and reasonable avenues. The suggested difficulty, loss and expense, which appellee will sustain in connection with the collection of the tax from mail order customers due to the fact that some would not include the tax with the purchase price, is answered by Mr. Justice Brandeis, in the opinion of Pierce Oil Co. v. Hopkins, 264 U. S. 137, 68 L. ed. 592, 596, in the following language:

"A short answer to this argument is that the seller is directed to collect the tax from the purchaser when he makes the sale; and that a state which has, under its constitution, power to regulate the business of selling gasoline (and doubtless, also, the power to tax the privilege of carrying on that business), is not prevented by the due process clause from imposing the incidental burden."

Appellee's contention, that the law discriminates against it in that other out-of-state mail order houses, who have

not qualified as retailers within the State of Iowa, are not subject to the burden of collecting the tax, may be disposed [fol. 158] of by stating that such corporations enjoy no privilege granted to them by the State of Iowa. The mail order business conducted by appellee is only one branch of its extensive business transacted with Iowa customers. It enjoys the privilege of operating twelve large retail stores within the state; all of these stores carry on a mail order business for their customers if the goods wanted are not carried in stock; and, through the means of distributing hundreds of thousands of catalogues to people throughout the State of Iowa, they reach into the state and transact business, designated as Type III, amounting to more than five and a half million dollars annually, comprising approximately 1,200,000 orders with Iowa mail order customers, in the year 1937. Needless to say, the privilege of doing business in Iowa is a valuable one, and the incidental burden of collecting the tax is no greater upon appellee than upon other domestic concerns doing business in competition with appellee within the state. It is a fact, so well known as to be judicially noticed, that practically all department stores in the state do a large mail order business in connection with their regular business, and, as to such business, would experience the same difficulty in collecting the tax in full from mail order customers. The incident of the tax being upon the use of the property within this state cannot be said to be an attempt on the part of the State to regulate out-of-state activities. No other state could impose a like burden upon the use of property within the State of Iowa, and, should the sister states, in which appellee's mail order establishments are situated, impose a sales tax or use tax equal or greater than the use tax imposed by the Iowa law, and the user in Iowa has paid the same, the Iowa Use Tax would not attach; hence, there is no possibility of a double imposition of the same burden.

[fol. 159] The Use Tax Act being complementary to the Retail Sales Tax, the two acts should be construed together. In this state, statutes in pari materia are construed together. Conly v. Dilley, 153 Iowa 677, 133 N. W. 730; Story County v. Hansen, 178 Iowa 452, 159 N. W. 1000; Balen v. Colfax Cons. Coal Co., 183 Iowa 1198, 168 N. W. 246; Fitzgerald v. State, 220 Iowa 547, 260 N. W. 681. The propriety of this rule was recognized by the United States Supreme

Court in Gregg Dyeing Co. v. Query, 286 U. S. 472, 76 L. ed. 1232, 52 S. Ct. 631, 84 A. L. R. 831, wherein Chief Justice Hughes, speaking for the court, said:

"There is no demand in that Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power."

When the two acts are considered together, it is manifest that the general plan and purpose running throughout the provisions of the statutes is that of equal distribution, as far as possible, of the burden as between domestic and foreign corporations conducting a retail business within the state, and that there is nothing in the law imposing the tax or the regulatory means adopted for collecting the same which imposes an inequality upon or discriminates against appellee.

We hold that the collection provisions of the Iowa Use Tax Act, as applied by the appellants, is not an invasion of the constitutional provisions of the Constitution of the United States relied upon by appellee and, accordingly, the decree of the trial court should be reversed.

Stiger and Richards, J. J., join in dissent.

[fol. 160] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 161] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Iowa is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Stone and Mr. Justice Roberts took no part in the consideration and decision of this application.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 256

LOUIS E. RODDEWIG, AS CHAIRMAN OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, ETC., ET AL., PETITIONERS,

vs.

MONTGOMERY WARD AND CO., INCORPORATED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

PETITION FOR CERTIORARI FILED JULY 12, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 256

LOUIS E. RODDEWIG, AS CHAIRMAN OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, ETC., ET AL., PETITIONERS,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

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[fol. 1]

IN SUPREME COURT OF IOWA, SEPTEMBER TERM, 1939

9-44963

Equity

MONTGOMERY WARD & Co., Incorporated, Appellee,

vs.

LOUIS E. RODDEWIG, D. L. MURROW, and C. F. GREEN, Individually and as Members of the Iowa State Board of Assessment and Review, Appellants

Appeal from District Court of Polk County, Iowa, Honorable John J. Halloran, Judge

Appellant's Abstract of the Record—Filed June 30, 1939

[fol. 2] On the 14th day of March, 1938, the plaintiff, Montgomery Ward & Company, Inc., filed in the District Court of Polk County, Iowa, the following petition in equity:

PETITION

Comes now the plaintiff, Montgomery Ward & Co., Incorporated, and for cause of action alleges as follows:

1. The plaintiff, Montgomery Ward & Co., Incorporated, is a corporation organized under the laws of the State of Illinois, duly licensed to do business in the State of Iowa.

2. The defendants, Louis E. Roddewig, D. L. Murrow, and C. F. Green, are all of the members of the Iowa State Board of Assessment and Review of which the defendant Roddewig is Chairman and the defendant Murrow is Vice Chairman, all of the said defendants residing in the City of Des Moines and County of Polk.

3. The plaintiff operates in the State of Iowa twenty-seven retail stores and has substantial investments therein. The assessed valuation of its tangible property in Iowa for the year 1937 exceeded, to-wit, one million dollars. Plaintiff and its predecessor corporation have been engaged in operating retail stores in the State of Iowa for the past

ten years or more. The sales made by said stores during the year 1937 exceeded, to-wit, eight million dollars.

4. On February 28, 1938, said defendants hereinafter referred to as the Board, caused to be served upon the manager of the plaintiff's store at Des Moines, Iowa, a copy of a Notice and Order, true copies of which are marked Exhibits "A" and "B" respectfully, attached hereto and expressly made a part hereof as fully as if set forth herein.

5. The said Order, Exhibit "B", attached hereto, requires this plaintiff to observe all of the terms of Chapter 198 of the Laws of the 47th General Assembly, hereinafter referred to as the Iowa Use Tax Law; and further orders [fol. 3] that, if by the fifteenth day of March, 1938, this plaintiff is not able to produce evidence of complete compliance with the terms of the said law and of the Order, the sales permit heretofore issued to the plaintiff for the operation of its retail establishments in the State of Iowa will be cancelled.

6. Section 21 of the Iowa Use Tax Law provides that the Defendant Board may revoke the permit issued to retailers by virtue of Section 11 of the Senate File 316, Acts of the 47th General Assembly of the State of Iowa, hereinafter called the Iowa Sales Tax Law, upon a finding by the Board of a failure to comply with any provision of the Iowa Use Tax Law. Plaintiff states that it holds a permit issued under the aforesaid Section 11 of the Iowa Sales Tax Law, that its sole business in the State of Iowa is as a retailer, and that such Section 11 of the Iowa Sales Tax Law makes it unlawful to transact business as a retailer without such permit.

7. The said Order, Exhibit "B", attached hereto further provides that if this plaintiff has not fully complied with the Iowa Use Tax Law by the 15th of March, 1938, the Defendant Board will certify the fact to the Secretary of State with a request that the license of this plaintiff to do business in the State of Iowa be revoked. Section 21 of the Iowa Use Tax Law provides that upon the receipt by the Secretary of State of such a certified finding, the Secretary of State shall revoke the license to do business in the State of Iowa. Such action by the Secretary of State would render it unlawful for the plaintiff to operate any of its

retail stores or otherwise engage in business in the State of Iowa.

8. In addition to the operation of retail stores in the State of Iowa, the plaintiff also is engaged in the business of selling tangible merchandise at retail at Chicago, Illinois; Kansas City, Missouri; and St. Paul, Minnesota, by means of [fol. 4] orders received at its mail order houses at those locations from customers residing in all parts of the Middle West, including the State of Iowa.

9. In connection with the mail order business conducted at Chicago, Kansas City, and St. Paul, the plaintiff circulates, or causes to be circulated, to customers and prospective customers located in all parts of the Middle West, including the State of Iowa, catalogs describing the merchandise offered for sale and instructing such customers and prospective customers how to order this merchandise from the said mail order houses.

10. The plaintiff offers for sale at its said mail order houses at Chicago, Kansas City, and St. Paul, and through its said catalogs, many items of merchandise which are not offered for sale through its retail stores located in the State of Iowa.

11. Plaintiff further states that it has at its St. Paul, Minnesota, Kansas City, Missouri, and Chicago, Illinois, mail order houses received since the passage of the Iowa Use Tax Law, and is now receiving, many orders from Iowa customers; that such orders specify what method of shipment is to be employed; that such orders call for shipment at the expense of such Iowa customers of the merchandise ordered to points within the State of Iowa; and that many such orders have been accepted and are being accepted at the said mail order houses and shipped as instructed to customers within the State of Iowa from the said mail order houses located outside the State of Iowa. Plaintiff further states that its catalogs sent to such Iowa customers clearly indicate that such orders will be shipped from the said mail order houses outside of the State of Iowa and the fact that such shipments will be made from such mail order houses outside of the State of Iowa is known to such customers when their orders are sent to the said mail order [fol. 5] houses. Plaintiff further states that the Board has

never attempted to assess or collect an Iowa sales tax on such sales made in interstate commerce.

12. Plaintiff also operates retail stores in the States of Illinois, Missouri, Nebraska, South Dakota, and Minnesota, in cities and towns adjacent to the State of Iowa. From time to time plaintiff has made, and is making sales of tangible personal property in these retail stores to customers residing in the State of Iowa, and who make known this fact to the plaintiff at the time these sales are made.

13. Section 8 of the Iowa Use Tax Act provides with respect to the sales described above.

"Every retailer maintaining a place of business in this state, * * * shall at the time of making such sales, whether within or without the state, collect the tax imposed by this Act from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the Board, if the Board shall, by regulation, require such receipt. * * *"

14. Section 9 of the Iowa Use Tax Act provides that:

"The Board may, in its discretion, upon application, authorize the collection of the tax herein imposed by any retailer not maintaining a place of business within this state. * * * Such authority and permit may be cancelled when, at any time, the board considers the security inadequate, or that such tax can more effectively be collected from the person using such property in this state."

15. Plaintiff states that there are other mail order houses operated by corporations which are not licensed to do busi- [fol. 6] ness in the State of Iowa which do not maintain a place of business in the State of Iowa which have not been authorized to collect and do not collect the Iowa Use Tax as above provided, and which are in substantial competition with the plaintiff's mail order houses in making sales to residents of Iowa. Plaintiff further states that there are other retail stores not located in the State of Iowa operated by corporations or individuals who do not maintain a place of business in the State of Iowa and who are in competition with plaintiff's retail stores in Minnesota, Illinois, Missouri, and Nebraska in making sales to residents of Iowa.

16. Plaintiff has collected no use tax on sales made as described above. Plaintiff does not maintain any accurate record of individual sales for cash either from its retail stores in the States of Illinois, Missouri, Nebraska, South Dakota, or Minnesota, or at its three mail order houses at Kansas City, St. Paul, and Chicago, nor any records which permit the segregation of such sales to Iowa customers or for use in the State of Iowa from other sales made by such stores and mail order houses. Plaintiff states that the maintenance of such records in such mail order houses and retail stores would be a substantial expense and plaintiff states that such records are not kept by others who operate mail order houses and retail stores in competition with this plaintiff in making such sales to Iowa customers but who do not maintain a place of business in the State of Iowa.

17. Section 3 of the Iowa Use Tax Law provides that:

"The use in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

[fol. 7] 1. Tangible personal property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Senate File 316, Acts of the Forty-seventh General Assembly, and any amendments made or which may hereafter be made thereto."

Plaintiff shows to the court that by the operation of this section all sales in local intra-state commerce consummated in the State of Iowa are exempted from the operation of the Iowa Use Tax Law.

18. Section 27 of the Iowa Use Tax Law provides that:

"If any article of tangible personal property has already been subjected to a tax by any other states in respect to its sale or use in an amount less than the tax imposed by this title, the provisions of this title shall apply, but at a rate measured by the difference only between the rate herein fixed and the rate by which the previous tax upon the sale or use was computed. If such tax imposed in such other state is two per cent (2%) or more, then no tax shall be due on such articles."

Plaintiff further shows to the court that in other states adjoining the State of Iowa taxes are imposed upon the oc-

cupation of retailing measured by the amount of gross sales, and that the incidence of such taxes is upon the transactions of sale even though the sale or use of the property is not subjected to tax.

19. Plaintiff states that retail merchants doing a purely local business in the State of Iowa cannot be compelled by [fol. 8] any provisions of existing law to prepare or issue any such receipts in connection with local instrastate sales as the plaintiff by Section 8 of the Iowa Use Tax Law is subject to be required to issue with respect to its sales in interstate commerce described above. Plaintiff further alleges that the issue of such receipts in each individual case would materially and substantially add to the expense of conducting its interstate commerce described above.

20. Section 11 of the Iowa Use Tax Act provides that:

"The tax herein required to be collected by any retailer pursuant to Sections Eight or Nine hereof, and any tax collected by any retailer pursuant to said sections, shall constitute a debt owed by the retailer to this state."

although the tax in question, as provided in Section 2 of said Act is

"An excise tax * * * imposed on the use in this state of tangible personal property purchased on or after the effective date of this act for use in this state, at the rate of two per cent of the purchase price of such property. Said tax is hereby imposed upon every person using such property within this state until such tax has been paid. * * *"

21. Plaintiff alleges that the Iowa Use Tax Law is unconstitutional in so far as it purports to require the plaintiff to collect a use tax from Iowa customers in connection with its sales in interstate commerce and in other states described above for the following among other reasons, to-wit:

[fol. 9] (a) The requirement that the plaintiff collect such tax and be liable for the amount of such tax directly burdens and restricts the privilege of engaging in interstate commerce, and is a violation of Section 8 of Article 1 of the United States Constitution for the following among other reasons, to-wit:

(1) The Iowa [illegible] of the use [illegible] commerce trans-

actions, burdens interstate commerce by being applicable to such transactions while not applicable to local intra-state commerce of a similar nature within the State of Iowa.

(2) The Iowa Use Tax Law places upon this plaintiff the burden with reference to interstate commerce transactions of ascertaining the place where merchandise purchased is to be used by the purchaser, which burden is not placed upon other merchants doing solely a local and intra-state business within the territorial limits of the State of Iowa.

(3) By virtue of the provisions making this plaintiff primarily liable for the amount of the use tax it is required to collect, such liability is made to attach upon the exercise by this plaintiff of the privilege of engaging in the interstate commerce transactions described above.

(4) Plaintiff is by virtue of the provisions of Section 8 of the Iowa Use Tax Law subjected to the burden of giving to purchasers in interstate commerce a receipt for the amount of the use tax collected, which is a requirement not placed upon those in competition with this plaintiff doing [fol. 10] solely an intra-state retail business within the boundaries of the State of Iowa.

(5) The exercise by the plaintiff of the privilege of selling merchandise in interstate commerce is burdened and restricted by the requirement that the plaintiff act as collector of the use tax for the State of Iowa in connection with its interstate commerce transactions.

(6) The provision that the plaintiff be primarily liable for the tax required to be collected at the time of making a sale of merchandise for use in Iowa makes the burden upon the plaintiff in substance identical with the burden of a sales tax imposed at the time of making such sales.

(7) The incidence of the burden of primary liability for the use tax is equally capable of imposition by the state in which the sale is consummated.

(8) The provision that sales or use taxes paid [illegible] states shall be credit[illegible]

[illegible] the burden of [illegible] such double returns as to plaintiff's interstate transactions while local intra-state commerce transactions would not be so burdened.

(b) The requirement that the plaintiff collect the Iowa Use Tax on merchandise sold by the plaintiff at retail at points outside the State of Iowa while no use tax is imposed upon the use of merchandise sold in intra-state commerce within the State of Iowa violates Section 10 of Article 1 of [fol. 11] the Constitution of the United States in that the use tax in such instance amounts to an impost or duty on merchandise imported into the State of Iowa for use and consumption therein.

(c) The Iowa Use Tax Law as applied to this plaintiff violates the Fourteenth Amendment to the Constitution of the United States in the following particulars among others, to-wit:

(1) The State of Iowa has no jurisdiction over the plaintiff's sales activities carried on at its St. Paul, Minnesota, Kansas City, Missouri, or Chicago, Illinois, mail order houses, or at its Illinois, Missouri, Nebraska, South Dakota, and Minnesota retail stores.

(2) The requirement that this plaintiff act as a tax collecting agent of the State of Iowa at a point outside of the State of Iowa is an attempt of the State of Iowa to enforce its laws extraterritorially.

(3) The requirement that this plaintiff because it operates retail stores within the State of Iowa must collect this tax upon sales of merchandise for use in the State of Iowa made outside of the State of Iowa through its aforesaid mail order houses and retail stores discriminates between this plaintiff and other competing mail order companies and retail stores making similar sales which do not maintain a place of business in the State of Iowa and are not subject to the Iowa Use Tax Law.

(4) The requirement that this plaintiff be primarily liable for a tax imposed upon others with respect to a privilege not exercised by this plaintiff deprives plaintiff [fol. 12] of its property without due process of law, and deprives it of the equal protection of the laws.

(5) The requirement that this plaintiff collect the tax when

"making sales of tangible personal property for use in this state"

is arbitrary, capricious, and vague in that it does not set forth any standard for determining when sales made outside of the State of Iowa are made for use within the State of Iowa, and subjects this plaintiff to determine at its peril questions of fact in each case whether or not such sales were made for use in the State of Iowa and whether or not plaintiff or its employees had knowledge of the fact that the property sold would be used within the State of Iowa.

(6) The meaning and application of the Iowa Use Tax Law cannot be determined without reference to the provisions of other and separate statutes of the State of Iowa, especially the Iowa Sales Tax Law, nor without reference to the statutes of states other than Iowa.

(7) The exemption in Section 3 of the Iowa Use Tax Law of the use of merchandise used in interstate commerce and of merchandise used in the performance of contracts entered into prior to the enactment of the Iowa Use Tax Law, and of merchandise not readily obtainable in the state of Iowa used in the operations of street railways makes the operation of the Iowa Use Tax Law as to this plaintiff arbitrary, capricious, and vague in that it imposes upon the plaintiff at its peril the duty of ascertaining facts not within its ordinary knowledge nor capable [fol. 13] of exact definition or ascertainment, and is discriminatory against the plaintiff.

(8) The requirement that this plaintiff act as a tax collecting agent of the State of Iowa at points outside of the State of Iowa without receiving any compensation therefor deprives this plaintiff of its property without due process of law.

(d) The Iowa Use Tax Law is unconstitutional and void because it imposes a tax upon the use of objects which can only be determined by reference to another law in violation of Article VII, Section 7 of the Iowa Constitution, and is further unconstitutional and void because in respects heretofore set forth it is arbitrary, unreasonable, discriminatory, capricious, vague, and confiscatory in violation of Article I, Section 9, and Article I, Section 6, of the Iowa Constitution, and is further unconstitutional and void because it is a special law for the assess-

ment and collection of taxes for state purposes, in violation of Article III, Section 30, of the Iowa Constitution.

(e) The Iowa Use Tax Law is unconstitutional and void in violation of Article III, Section 29, Iowa Constitution, in that the title to the said Act states that it imposes a

"tax on the use in this State of tangible personal property, as such terms are defined herein, * * *"

which is an excise tax, but that the provisions of said Act actually impose and levy a direct tax upon certain businesses, including the business of this plaintiff, and said Act further provides for the levy and collection of [fol. 14] said tax as a direct obligation of certain businesses, including the business of this plaintiff; that said Act therefore embraces more than one subject, which is not expressed in the title to the Act.

22. Plaintiff alleges that Sections 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, and 27, are inseparable and incapable of application if separately construed or separately made effective.

23. Plaintiff has during the past several years built up a substantial business in the State of Iowa which the defendants threaten to destroy by revocation of the plaintiff's license to conduct a retail business and by procuring the termination of the plaintiff's authority to conduct business in the State of Iowa. Plaintiff states that irreparable injury will result to plaintiff unless the defendants are enjoined from proceeding with the said threatened revocation of plaintiff's permit to do a retail business in the State of Iowa and its license to do business in the State of Iowa. Plaintiff states that it has as a result of the operation of its retail stores acquired good will which is dependent upon its ability to continue to serve its customers to service the merchandise already sold to them, and to continue to fill their requirements, which would be irreparably damaged by any cessation of its retail business. Plaintiff states that it has no plain, speedy and adequate remedy at law since there is no provision of an appeal from the threatened order of revocation during the time of which appeal plaintiff could continue to operate its business, there being no provision for payment of the tax and suit to recover it back in an

action against the State of Iowa. Plaintiff states that the Iowa Use Tax Law became effective April 16, 1937, and that the first action taken by the state to compel the plaintiff to collect the use tax in connection with sales [fol. 15] made through its mail order houses and retail stores in adjoining states to Iowa customers of merchandise to be used in the State of Iowa was the notice, referred to in Paragraph Four above, served upon it February 28, 1938, and that an order enjoining defendants and each of them from proceeding to revoke the plaintiff's license to conduct a retail business and from certifying to the Secretary of State for purposes of withdrawing the authority of the plaintiff to do business in the State of Iowa, that the plaintiff has failed to comply with the provisions of the Iowa Use Tax Law is necessary pending a full hearing on the merits of this suit in order to preserve the status quo of the plaintiff and of the defendant Board.

Wherefore plaintiff prays that the defendants individually and as members of the Iowa State Board of Assessment and Review be permanently enjoined and restrained from doing any or each of the following:

(a) Making any finding of fact that this plaintiff has failed to comply with the requirements of the order of the Board dated February 26, 1938.

(b) Making any finding that this plaintiff has failed to comply with the provisions of the Iowa Use Tax Law.

(c) Revoking or cancelling any sales permit issued to the plaintiff covering the operation of its retail establishments in the State of Iowa.

(d) Sending any copy of any order of the said Board with respect to this plaintiff's failure to comply with the Iowa Use Tax Law to the Secretary of State of the State of Iowa.

(e) Making any request upon the Secretary of State of the State of Iowa for the revocation of the permit of [fol. 16] this plaintiff to do business within the State of Iowa.

(f) From taking any action or issuing any order under or in accordance with the resolution and order of the re-

spondent, Exhibit "A" attached hereto, dated February 26, 1938.

(g) From taking any action that will in any way disturb the position of this plaintiff with respect to its business in the State of Iowa as a result of any failure on the part of this plaintiff to comply with any provisions of the Iowa Use Tax Law.

Plaintiff further prays this court to issue a temporary order restraining and enjoining the said defendants from taking any action as outlined above or proceeding further in this matter until such time as this suit may be heard upon its merits.

Plaintiff further prays for such other and further relief as in equity may be proper and necessary.

P. G. C. & O. B., Robert L. Wright, Stuart S. Ball,
Attorneys for Plaintiff.

EXHIBIT "A" TO PETITION

Notice

To Montgomery Ward & Company:

You are hereby notified that on the 26th day of February, 1938, the Iowa State Board of Assessment and Review pursuant to the powers vested in it by law of the State of Iowa did make and enter the Resolution and Order hereto attached marked Exhibit "A" and hereby made a part of this Notice.

[fol. 17] You are further notified that in accordance with the Resolution and Order hereto attached the hearing ordered in said Resolution and Order will be held on the 15th day of March, 1938, at 9:30 A. M. at the offices of the Iowa State Board of Assessment and Review at the Des Moines Building, Des Moines, Iowa, to determine whether or not you have complied with the said Order.

You are further notified that if at said hearing the Iowa State Board of Assessment and Review shall find that you have willfully failed to comply with the requirements of the Resolution and Order thereto attached and marked Exhibit "A", then the sales permit heretofore issued to you for the operation of your retail establishments in the State

of Iowa will be cancelled and an order shall be entered finding that you have failed to comply with the provisions of the Use Tax Act and the orders of the Iowa State Board of Assessment and Review in connection therewith and a copy of said order shall be transmitted to the Secretary of State with the request that your permit to do business within the State of Iowa shall be revoked.

You are further notified that at the hearing to be held at the time and place above specified you may appear and show cause, if any you have, why the orders contained in the Resolution and Order attached hereto or the orders above referred to, or any of them, should not be made and enforced.

You will govern yourselves accordingly.

Iowa State Board of Assessment and Review, Louis E. Boddewig, Chairman.

STATE OF IOWA,
Polk County, ss:

I, Charles Bookin being first duly sworn on oath state that on the 28th day of February, 1938, I served the within [fol. 18] notice to which was attached a true and correct copy of the Resolution and Order of the Iowa State Board of Assessment and Review dated this 26th day of February, 1938, and marked Exhibit "A" upon Montgomery Ward & Company by delivering a true and correct copy of said Notice and Resolution and Order attached thereto and offering to read the original, which reading was waived, to A. M. Nordtvedt, who is the manager of the Des Moines retail branch maintained by Montgomery Ward & Company, and who is an agent in this State engaged in the transaction of Montgomery Ward & Company's business.

Charles Bookin.

Subscribed and sworn to before me, a Notary Public in and for Polk County, Iowa, this 28th day of February, 1938. E. Mae Sweany, Notary Public in and for Polk County, Iowa.

Exhibit "B" to Petition

Resolution and Order of the Iowa State Board of Assessment and Review.

At a meeting of the State Board of Assessment and Review held this 26th day of February, 1938, the matter of Montgomery Ward & Company came before the Board for consideration in regard to the Use Tax law. On motion of C. F. Green, seconded by D. L. Murrow the following resolution and order was adopted, all members of the Board voting aye:

Whereas, Montgomery Ward & Company is a corporation organized under the laws of the State of Illinois for the purpose of engaging in the retail sale of wares and miscellaneous articles of merchandise; and

[fol. 19] Whereas, Montgomery Ward & Company did on or about the 30th day of July, 1934, duly make application under the provisions of Chapter 386 of the 1931 Code of Iowa to the Secretary of State for a permit to transact business in the State of Iowa and pursuant thereto received a permit authorizing it to conduct and carry on its business in the State of Iowa; and

Whereas, Montgomery Ward & Company has heretofore made application for and received a permit to transact business as a retailer within the State of Iowa and by virtue of the foregoing maintains within the State of Iowa approximately 27 retail establishments or places of business and is a retailer within the purview of subdivisions 5 and 6 of Section 1 of Chapter 198 of the Laws of the 47th General Assembly; and

Whereas, Montgomery Ward & Company issues, distributes and widely circulates in Iowa its catalog wherein it describes and pictures merchandise which is obtainable at its various retail establishments within the State of Iowa or at retail establishments maintained by other retailers in the State of Iowa and solicits the purchase of any of the items so described in its catalog through mail orders sent direct to its home office in Chicago, Illinois there to be accepted, filled and shipped; and

Whereas, one or more of said catalogs are also kept at each of the said retail stores maintained by Montgomery Ward & Company within the State of Iowa; and whereas citizens and residents of the State of Iowa who come to

any of said stores of Montgomery Ward & Company located in the State of Iowa are assisted in selecting from the mail order catalogs there kept and displayed any of the articles of merchandise listed therein and are assisted in filling out order blanks for said merchandise to be mailed to the Chi-
[fol. 20] cago, Illinois branch of said company by either the purchaser or the assisting retail store; and

Whereas, attached to its catalog, Montgomery Ward & Company has the following notation:

"To Our Iowa Customers:

We believe that certain of the provisions of the Iowa Use Tax as applied to our business are unconstitutional. We are therefore not collecting or reporting the use tax on mail orders sent by Iowa customers direct to any of our mail order houses. Until you hear from us to the contrary, mail in your orders just as you have in the past.

Montgomery Ward & Company"; and

Whereas, it is intended, and as a matter of fact, citizens and residents of Iowa are thereby induced and encouraged to view at the retail establishments maintained by Montgomery Ward & Company items of merchandise that they desire to purchase and then to mail or have their orders mailed for said merchandise to Montgomery Ward & Company's Chicago, Illinois office to be shipped direct to said purchaser by mail, freight, or express and thus avoid the 2% sales tax or use tax which said purchaser otherwise would have had to pay if he had purchased said item in Iowa, or from some other retailer maintaining a store in Iowa, or had taken said item from the stock of merchandise kept at one of the retail establishments maintained by Montgomery Ward & Company in the State of Iowa; and

Whereas, Montgomery Ward & Company has failed, neglected, and refused to comply with the provisions of Chapter 198 of the Acts of the 47th General Assembly in the following particulars, to-wit:

[fol. 21] (a) By refusing and failing to comply with the mandatory provision of Section 8 of the Act, which requires every retailer maintaining a place of business in the State of Iowa and making sales of tangible personal property for use in the State of Iowa to collect the tax imposed by the Act from the purchaser at the time of making the sale,

whether said sale was made within or without the State of Iowa;

(b) By neglecting, failing, and refusing to file with the Board returns showing the sales of any or all tangible personal property sold by Montgomery Ward & Company during the preceding quarterly period for use within the State of Iowa, or to make any remittance of the amount of such tax which they are by Section 12 of the Act required to collect;

(c) By advertising, holding out, and stating to the public and to its customers that the tax imposed by the Act will not be added to the selling price of the merchandise purchased from it by its customers, and that it will not collect nor report the same, all in contravention of the provisions of Section 10 of the Act; and

Whereas, it is a matter of common knowledge that it is impossible from an enforcement and administrative standpoint for the State of Iowa to collect the use tax or the sales tax from the purchaser unless the retailer, acting as the designated agent of the state collects said tax and remits the same to the State; and

Whereas, Montgomery Ward & Company is given equal protection to its property located within the State of Iowa and is equally offered all of the facilities enjoyed by any other retailer in the State of Iowa; and

[fol. 22] Whereas, Montgomery Ward & Company by its refusal to comply with the provisions of the Act as above specified seeks to and does unfairly compete with all other retail dealers in the State of Iowa who comply with the requirements of the sales tax act and the use tax act and who collect said sales and use tax as by law required; and

Whereas, Montgomery Ward & Company is engaging in an unfair trade practice by using the branch retail establishments it maintains in the State of Iowa and the retail establishments it maintains outside of the State of Iowa as a means of circumventing the sales tax act of Iowa and as a means of offering its customers a 2% differential on all purchases made by said Iowa customers from it over like purchases said customers might make from other Iowa retailers; and

Whereas, Montgomery Ward & Company by adopting the aforesaid practices and publicly refusing to perform its

duties with reference to the use tax is inducing citizens of this State to evade the laws of the State of Iowa to the detriment of the public revenue and to the unfair advantage of law abiding competitors.

Now, Therefore, Be It Resolved by the Iowa State Board of Assessment and Review pursuant to the powers vested in it by law, and it is hereby Ordered as follows:

1. That Montgomery Ward & Company comply with the mandatory provisions of Section 6 of Chapter 198 of the Acts of the 47th General Assembly, known as the Use Tax Act, by collecting from its Iowa purchasers the tax required on all sales of tangible personal property sold by it to said purchaser for use in the State of Iowa.

2. That Montgomery Ward & Company file with the Iowa Board of Assessment and Review within twelve [fol. 23] days from the date of the service of this order all quarterly reports required by the provisions of the Use Tax Act, Chapter 198 of the Laws of the 47th General Assembly and not heretofore filed.

3. That Montgomery Ward & Company pay to the Iowa Board of Assessment and Review within twelve days from the date of the service of this order all use tax due the State of Iowa as shown by said quarterly reports and as required by the provisions of Chapter 198 of the Laws of the 47th General Assembly and all penalties and interest due thereon as required by Section 17 of said Act.

4. That Montgomery Ward & Company publicly announce, within twelve days from the date of the service of this order, to its Iowa customers that all purchases made by them, from it, of merchandise for use in the State of Iowa and on which an Iowa sales tax has not been paid will be subject to a 2% use tax which will be added to the sales price and collected from said customer by Montgomery Ward & Company.

5. That Montgomery Ward & Company make available at Des Moines, Iowa within twelve days from the date of the service of this order all of its books, papers, and records relating to all sales of tangible personal property made by it beginning with the first day of April, 1937 to Iowa customers for use or enjoyment within the State of Iowa for

such examination and audit as the Iowa State Board of Assessment and Review shall deem it advisable to make.

It is further resolved and ordered that on the 15th day of March, 1938 at 9:30 A. M. a hearing will be held by the Iowa State Board of Assessment and Review at its office in Des Moines, Iowa to determine whether or not the above and foregoing order and all portions thereof have been complied with at which time and place you, Montgomery [fol. 24] Ward & Company may be present and represented by counsel, if you so desire.

It is further resolved and ordered that if at said hearing the Iowa State Board of Assessment and Review shall find that you have wilfully failed to comply with the requirements of the foregoing order, then the sales permit heretofore issued to you for the operation of your retail establishments in the State of Iowa will be cancelled and an order shall be entered finding that you have failed to comply with the specific provisions of the Use Tax Act and the orders of the Iowa State Board of Assessment and Review in connection therewith, and a copy of said order shall be transmitted to the Secretary of State with the request that your permit to do business within the State of Iowa shall be revoked.

It is further resolved and ordered that at the hearing to be held at the time and place above indicated, you may appear and show cause, if any you have, why the orders above referred to or any of them should not be made.

Signed this 26th day of February, 1938.

Iowa State Board of Assessment and Review, by Louis E. Roddewig, Chairman, D. L. Murrow, Vice Chairman, C. F. Green, Member.

ORDER GRANTING TEMPORARY INJUNCTION

Thereafter on the 15th day of March, 1938, an order granting temporary injunction was entered by the District Court directing that a writ of injunction issue restraining the defendants from:

(a) Making any finding of fact that the plaintiff has failed to comply with the requirements of the Board dated February 26, 1938;

(b) Making any finding that the plaintiff has failed to [fol. 25] comply with the provisions of the Iowa Use Tax Law;

(c) Revoking or cancelling any sales permit issued to the plaintiff covering the operation of its retail establishments in the State of Iowa;

(d) Sending any copy of any order of the said Board with respect to the plaintiff's failure to comply with the Iowa Use Tax Law to the Secretary of State of the State of Iowa;

(e) Making any request upon the Secretary of State of the State of Iowa for the revocation of the permit of the plaintiff to do business within the State of Iowa;

(f) From taking any action or issuing any order under or in accordance with the resolution and order of the respondent dated February 26, 1938, in connection with the claimed failure of the plaintiff to comply with the Iowa Use Tax Law;

(g) From taking any action that will in any way disturb the position of the plaintiff with respect to its business in the State of Iowa, as a result of any claimed failure on the part of the plaintiff to comply with any provisions of the Iowa Use Tax Law;

Injunction bond fixed in the sum of $20,000.00.

Thereafter on the same day writ of injunction was served on the defendants enjoining them from the acts set forth in the order for the writ as listed above.

Thereafter on April 21, 1938, defendants filed the following motion:

Motion to Strike from Petition

Come now the defendants in the above entitled action in their individual capacity and as members of the Iowa State [fol. 26] Board of Assessment and Review and move the Court:

1. To strike from the plaintiff's petition the following language appearing in Paragraph numbered 10 thereof:

"The plaintiff offers for sale at its said mail order houses at Chicago, Kansas City, and St. Paul, and through its said catalogs, many items of merchandise which are not offered

for sale through its retail stores located in the State of Iowa."

for the following reasons:

A. That the said averment is incompetent, irrelevant and immaterial to plaintiff's purported cause of action and constitutes redundant matter and surplusage.

2. To strike from the petition of the plaintiff the following language appearing in Paragraph 11 thereof:

"Plaintiff further states that the Board has never attempted to assess or collect an Iowa sales tax on such sales made in interstate commerce."

for the following reasons:

A. That said averment is the averment not of an ultimate fact, but of a mere conclusion and wholly incompetent, irrelevant and immaterial and constitutes redundant matter and surplusage.

3. To strike from the petition of the plaintiff the fifteenth paragraph there reading as follows:

"Plaintiff states that there are other mail order houses operated by corporations which are not licensed to do busi- [fol. 27] ness in the State of Iowa which do not maintain a place of business in the State of Iowa, which have not been authorized to collect and do not collect the Iowa Use Tax as above provided, and which are in substantial competition with the plaintiff's mail order houses in making sales to residents of Iowa. Plaintiff further states that there are other retail stores not located in the State of Iowa operated by corporations or individuals who do not maintain a place of business in the State of Iowa and who are in competition with plaintiff's retail stores in Minnesota, Illinois, Missouri, and Nebraska in making sales to residents of Iowa."

for the following reasons:

A. That the said averment is the averment not of an ultimate fact but states a mere conclusion which is wholly incompetent, irrelevant and immaterial to the plaintiff's purported cause of action and constitutes redundant matter and surplusage.

B. For the reason that the said averment is not the averment of an ultimate fact but the statement of a mere guess which does not purport to be founded upon any alleged fact or facts and is wholly incompetent, irrelevant and immaterial.

4. To strike from the petition of the plaintiff the following language appearing in Paragraph 16 thereof:

"Plaintiff states that the maintenance of such records in such mail order houses and retail stores would be a substantial expense and plaintiff states that such records are not kept by others who operate mail order houses and retail stores in competition with this plaintiff in making such sales to Iowa customers but who do not maintain a place of business in the State of Iowa."

[fol. 28] for the following reasons:

A. For all of the reasons urged in "A" and "B" of the third subdivision hereof.

B. Because the only matter properly triable in this proceeding is as to whether or not the provisions of the Iowa Use Tax Act are properly applicable to this plaintiff, and whether or not said provisions are being enforced or are applicable to others who are not parties to this action is immaterial and irrelevant.

5. To strike from the paragraph numbered 17 of said petition of the plaintiff the following language:

"Plaintiff shows to the court that by the operation of this section all sales in local intra-state commerce consummated in the State of Iowa are exempted from the operation of the Iowa Use Tax Law."

for the following reasons:

A. That the said averment is wholly irrelevant and immaterial to any purported cause of action of the plaintiff and constitutes redundant matter and surplusage.

B. That the only matter properly triable in this proceeding is whether or not the provisions of the Use Tax Act are applicable to the plaintiff and whether or not it must comply therewith and that whether or not others who are not

parties to this atcion are exempted from the operation of the Iowa Use Tax Act is immaterial and irrelevant.

6. To strike from the petition of the plaintiff the following language appearing in Paragraph 18 thereof:

"Plaintiff further shows to the court that in other states adjoining the State of Iowa taxes are imposed upon the occupation of retailing measured by the amount of gross [fol. 29] sales, and that the incidence of such taxes is upon the transactions of sale even though the sale or use of the property is not subjected to tax."

for the following reasons:

For all of the reasons urged in Subdivisions "A" and "B" of Paragraph Five hereof.

7. To strike from the petition of the plaintiff the following language appearing in Paragraph 19 thereof:

"Plaintiff states that retail merchants doing a purely local business in the State of Iowa cannot be compelled by any provisions of existing law to prepare or issue any such receipts in connection with local intra-state sales as the plaintiff by Section 8 of the Iowa Use Tax Law is subject to be required to issue with respect to its sales in interstate commerce described above. Plaintiff further alleges that the issue of such receipts in each individual case would materially and substantially add to the expense of conducting its interstate commerce described above."

for the following reasons:

For all of the reasons urged in Subdivisions "A" and "B" of the fifth paragraph hereof.

8. To strike from the petition of the plaintiff the following language appearing in Paragraph 23 thereof:

"Plaintiff states that the Iowa Use Tax Law became effective April 16, 1937, and that the first action taken by the State to compel the plaintiff to collect the tax in connection with the sales made through its mail order houses and retail stores in adjoining states to Iowa customers of mer- [fol. 30] chandise to be used in the State of Iowa was the notice referred to in Paragraph 4 above served upon it February 28, 1938."

for the following reasons:

A. That said averment is the averment not of an ultimate fact but states a conclusion which is wholly incompetent, irrelevant and immaterial to the plaintiff's purported cause of action and constitutes redundant matter and surplusage.

B. That the only matter properly triable in this proceeding is whether or not the provisions of the Iowa Use Tax Act are applicable to the plaintiff and whether or not it must comply therewith, and the question of whether or not prior attempts were made to secure the plaintiff's compliance with the provisions of the Use Tax Act are immaterial and irrelevant and constitute redundant matter and surplusage.

RULING ON MOTION TO STRIKE

The above Motion was overruled and thereafter on June 19, 1938, the defendants filed the following Answer:

ANSWER

Come now the defendants in the above entitled case and for answer to the plaintiff's petition deny each and every allegation therein contained not hereinafter specifically admitted, modified, or qualified.

1. The defendants admit the allegations contained in Paragraphs 1, 2, 4, 6, 9, 11, 13, 14 and 20 of the plaintiff's petition.

2. The defendants have neither knowledge nor information sufficient to form a belief as to the allegations contained in Paragraph 3 of plaintiff's petition wherein the plaintiff sets out the assessed valuation of its property within the [fol. 31] State of Iowa and gives the gross amount of its sales in 1937 and, therefore, deny the same and ask that the court require strict proof from plaintiff.

3. The defendants have neither knowledge nor information sufficient to form a belief as to the truth or correctness of the allegations contained in Paragraph 15 of the plaintiff's petition and, therefore, deny the same and ask that the court require strict proof from the plaintiff concerning the same.

4. Further answering, the defendants state that the plaintiff has an adequate, plain and speedy administrative rem-

edy and also a plain, speedy, efficient and adequate remedy at law in the courts of the State of Iowa. That the plaintiff has refused to avail itself of the procedure and machinery provided by the statutes of the State of Iowa and by the law courts of the State of Iowa or to appear before the Iowa State Board of Assessment and Review and show cause why it should not comply with the provisions of the Iowa Use Tax Act, but instead, seeks to invoke the equitable jurisdiction of this court. That an action in equity does not lie because of the plaintiff's failure to avail itself of its administrative remedy and because there is a plain, speedy, efficient and adequate remedy at law.

Further answering, the defendants aver and state that the Iowa Sales Tax Act, Chapter 196 of the Laws of the 47th General Assembly, which by reference thereto is hereby made a part of this Answer, and the Iowa Use Tax Act must be construed together in determining whether the Iowa Use Tax Act imposes a burden upon interstate commerce. That when so construed together the defendants state and aver that it is apparent that the said Iowa Use Tax is not so measured or conditioned as to hamper [fol. 32] the transactions of interstate commerce or discriminate against it but rather that equity is the theme that runs through all the sections of the said Iowa Use Tax Act.

Further answering, the defendants state that the purpose of the plaintiff in refusing to comply with the provisions of the Iowa Use Tax Act is to employ its branch retail establishments within the State of Iowa and its retail establishments without the State of Iowa as a means of attempting to circumvent the Iowa Sales Tax Act and the Iowa Use Tax Act and as a means of offering its Iowa customers a two per cent differential on all purchases made by said Iowa customers from it over like purchases said customers might make from other Iowa retailers who do comply with the Iowa Retail Sales Act and the Iowa Use Tax Act.

John H. Mitchell, Attorney General of the State of Iowa, Charles Bookin, Special Assistant Attorney General, Charles W. Wilson, Assistant Attorney General, Attorneys for the defendants in their individual capacity and as the Iowa State Board of Assessment and Review.

Thereafter on October 14, 1938, plaintiff filed the following reply:

Reply

Comes now the plaintiff and, for reply to the answer of the defendants, alleges as follows:

1. That the plaintiff denies each and every affirmative allegation contained in the answer of the defendants.

[fol. 33] 2. That as to Paragraph Four of the defendants' answer, this plaintiff alleges that it does not have an adequate, plain and speedy administrative remedy for the following reasons, among others:

(a) The Use Tax Act does not provide for a hearing and appeal.

(b) That this plaintiff did not comply with the demands made upon this plaintiff under the terms and conditions of the notice and order served upon it, which notice and order are attached to plaintiff's petition and marked Exhibits "A" and "B", and that by virtue of same and under the terms of the notice and order the Iowa State Board of Assessment and Review would have automatically rescinded the sales license issued to it and would have taken the steps contemplated to have its right to do business in the State terminated—all as set out in said notice and order.

3. Further replying to the fourth paragraph of the answer of the defendants, this plaintiff alleges that it has no speedy, plain and adequate remedy at law, and that no remedy at law is provided by the statutes of the State of Iowa.

4. Further replying to the fourth paragraph of the answer of the defendants, the plaintiff alleges that to construe the Iowa Sales Tax Act, Chapter 196 of the Laws of the Forty-seventh General Assembly and the Iowa Use Tax Act together, in determining whether the Iowa Use Tax Act imposes a burden on Interstate Commerce, is contrary to Section 7, Article VII, Constitution of the State of Iowa, and such construction would be unconstitutional for said reason, and for all the reasons urged in plaintiff's petition.

[fol. 34] Wherefore, plaintiff prays as in its original petition.

Maxwell O'Brien, J. L. Parrish, Jr., H. W. Bancroft, Stuart S. Ball, Attorneys for Plaintiff.

The trial of this case was had before the Honorable John J. Halloran, Judge of the District Court of Polk County, Iowa, and commenced on Thursday, October 13, 1938.

EVIDENCE OF PLAINTIFF, MONTGOMERY WARD & CO.

G. W. VAUGHT, called as a witness on behalf of the plaintiff, having been sworn by the Court, testified as follows:

I live in Kenilworth, Illinois, and I am the Treasurer and Director of Montgomery Ward & Company. I have been employed by the Montgomery Ward & Company for 21 years having served in the major divisions of the business, such as merchandising, sales, operating and finance. I was assistant manager of the packing and shipping department in the Chicago Mail Order House. I had charge of the clerical office which had to do with the handling of orders. I was merchandise controller and for a time the sales executive of the business. In this latter connection I issued the bargain book and assisted in the preparation of catalogs. In the financial division I was bookkeeper, head of the accounts payable department, branch house auditor, assistant treasurer, credit manager and treasurer. I have been treasurer for five years and I was head of the time payment or credit department from 1931 until 1933. [fol. 35] The records in the credit department show the address and residence of the various customers. I have supervision and general control over the books and records of the corporation. Montgomery Ward & Company is incorporated under the laws of Illinois and it is licensed to do business in Iowa. Its business consists of distributing general merchandise both through retail stores and mail order catalogs. With regard to the method the company uses to distribute merchandise through retail stores, I will state we have a store in a town with merchandise in it just like any other department or retail store and it is sold by clerks over the counter. A large classification of the goods so sold would be soft lines, consisting principally of clothing, house furnishings, consisting of furniture, jewelry and practically all things used in the household, and hard lines, consisting of hardware items, including farm implements, stoves, refrigerators and sporting goods.

The company has mail order houses located in Chicago, Illinois, Kansas City, Missouri, Fort Worth, Texas, Denver, Colorado, Portland, Oregon, Oakland, California, St. Paul, Minnesota, Albany, New York and Baltimore, Maryland. The Company started its mail order business in 1872. The Company has never maintained a mail order house within the State of Iowa, but it has made sales from the mail order houses outside the State of Iowa, and at present sales to customers within the State of Iowa are made from the Chicago, St. Paul and Kansas City houses. The Chicago mail order house first opened in 1872; the St. Paul mail order house in 1921 and the Kansas City mail order house was opened and in operation before I became associated with Montgomery Ward & Company. They are all three continuously engaged in business and have been since I have been associated with the Company.

[fol. 36] Montgomery Ward & Company had, as of August 1st, 1938, 29 stores operating within the State of Iowa. The amount of the investment which the Company has in these stores operating in the State of Iowa is $914,574.00 according to the assessed valuation as of the year 1937. The business conducted by these stores is exclusively a retail business with the exception of a small fence fabricating factory located at Fort Madison, Iowa. The Company first began to operate its retail stores with the Waterloo store opened January 14, 1928. The approximate sales made by the Company's retail stores in the year 1937 in the State of Iowa totaled $7,715,968.41. The stocks of merchandise carried in the retail stores located in Iowa average five thousand items and about 25% of the merchandise carried in the retail stores in Iowa is duplicated identically in the mail order houses and about 2 per cent of the merchandise carried for sale in the mail order houses is duplicated identically in the retail stores. We keep an analysis of all the items carried in the store, the number off stock keeping units, the space required and the dollar value of them. When I was merchandise controller I specified the merchandise that went into the stores and prepared the list of merchandise that could be carried in the stores, known as the basic lists. I still have occasion to study those basic lists and, as the present treasurer, I personally approve all orders over a certain dollar value.

The stocks of merchandise carried in the Chicago mail order house and in the St. Paul mail order house and in

the Kansas City mail order house are similar with the exception that the Chicago house carries slightly more items.

As the treasurer of Montgomery Ward & Company, I am familiar with the general catalog and familiar with the requirements as to space and light of a physical building [fol. 37] necessary to afford facilities to carry on a general mail order business. There is not sufficient space in any of the stores in Iowa for mail order business. There have not been any taxes or license fees to the State of Iowa for the privilege of carrying on the mail order business in any of the three mail order houses at any time during my association with the company. Prior to the opening of the Waterloo store on January 14, 1928, there was no factory or any other operation of the company conducted within the State of Iowa. The first operation was by the Delaware Corporation, a subsidiary corporation which operated from 1928 until the Illinois corporation was licensed August 1, 1934.

Mr. Ball: It is stipulated between counsel that this is a certified copy of the application for license to do business in the State filed by Montgomery Ward & Company, an Illinois corporation.

(The document referred to here presented and marked plaintiff's Exhibit "A".)

Offer: Mr. Ball: And our stipulation covers the fact it is offered and to be received in evidence.

Because the retail stores do carry only a portion of the wide selection handled by the mail order houses, many orders are referred by the retail stores to the mail order houses. We maintain a mail order service desk in each retail store with a clerk in attendance for that purpose. The profit from such sales is credited to the mail order business with a commission paid to the retail store for handling the business.

Q. What is the fact, if you know, as to whether or not the Iowa Sales Tax or Use Tax, either one, is being collected on such orders taken by the retail stores in Iowa and forwarded to the mail order houses for filing?

A. Yes, the tax is being collected and paid.

[fol. 38] Q. What is the fact as to whether or not presently the returns are being made to the State of Iowa covering the amount of these taxes?

A. They are being made.

The method by which the company sells merchandise to its Iowa customers by mail order is as follows:

The catalogs are distributed to the prospective customers in the State of Iowa. They select the merchandise, prepare an order for it, usually on an order blank that is provided in the catalog, specify the article, number, description and price and send the order with remittance to the mail order house. The remittance being for the cost of the merchandise and the transportation.

Approximately six million general catalogs are distributed twice a year and in addition to the general catalogs two small catalogs a year are distributed in greater number, the Christmas catalog; the bargain books, and a great many small special catalogs such as the tombstone catalog. With very few exceptions the catalogs sent to customers of the Kansas City mail order house are identical with the catalogs distributed to the customers whose orders are sent to Chicago and St. Paul. Certain items for use in cold climates are in the St. Paul catalog, but not in the Kansas City catalog. There are different instructions with regard to shipping in the catalogs.

(Six Montgomery Ward catalogs here marked respectively plaintiff's Exhibits "B", "C", "D", "E", "F", and "G".)

Mr. Bookin: No necessity of identifying them. I do want to object to their materiality.

Offer: Mr. Ball: If we can stipulate what they are by giving an explanation here. In connection with the testimony of this witness we offer into evidence what the reporter has marked Exhibit "B".

[fol. 39] The Court: I suggest you have the volumes identified as exhibits, and then some general description of them before you offer them into the record. In other words, have in the record something to indicate what Exhibit "B" is before you offer it, please.

Mr. Ball: It is stipulated that this witness would identify Exhibit "B" as the spring and summer catalog for the

year 1938, Chicago book being the form of the general catalog distributed at that time calling for customers' orders to be mailed to the mail order house at Chicago. Exhibit "C" is a spring and summer catalog for 1938, St. Paul book. That Exhibit "D" is a spring and summer catalog, 1938, Kansas City book. That Exhibit "E" is the fall and winter, 1937-1938 book, for St. Paul. Exhibit "F" is the fall and winter, 1937-1938 catalog, Chicago. That Exhibit "G" is the fall and winter 1937-1938 book for Kansas City. And that all of the catalogs distributed to Iowa customers—general catalogs—for these two general catalog periods, were similar to the six exhibits.

The Court: Now, are you offering them?

Offer: Mr. Ball: We now offer into evidence Exhibits "B", "C", "D", "E", "F" and "G".

Mr. Bookin: The offer of Exhibits "B" through "G", both inclusive, are objected to as incompetent, irrelevant and immaterial to any issue in this case.

The Court: But you waive any other formal identification?

Mr. Bookin: That's right, your Honor, formal identification is waived.

(A paper here presented and marked plaintiff's Exhibit "H": Order Blank.)

Mr. Ball: It is stipulated that the witness would identify plaintiff's Exhibit No. "H" as the order blank forms which have been used in all general catalogs and other catalogs [fol. 40] during the period from the enactment of the Iowa Use Tax Act up to the date of the filing of this petition.

The Court: Is that agreed to?

Mr. Bookin: Preliminary proof and identification being waived, the defendants object to Exhibit "—".

The Court: I ask you——

Mr. Bookin: Yes, waive preliminary proof and identification, your Honor.

Offer: Mr. Ball: Plaintiff offers into evidence Exhibit "H".

Mr. Bookin: Exhibit "H" is objected to as incompetent, irrelevant and immaterial to any issues in this case.

The spring and summer, 1938 catalog was distributed to Iowa customers during January and February and the gen-

eral catalog was distributed during July and the early part of August. Generally the customers followed the instructions in the book in sending in their orders. A substantial number of these various catalogs were distributed to these Iowa customers.

The Chicago mail order house is a large warehouse type of building containing about thirty-three acres floor space, and it is divided into sections. It is nine floors in height, and seven sect-ons, divided by fire walls. The departments are lined up in it according to the natural movement or path of an order, so that the order coming in is handled in the mail opening department where the order is opened, cash removed and customers' instruction read, and on to the index department where the customers' labels and the addresses are made from stencils, then to entry typing department where the orders are typed provided they call for merchandise from more than one department, and then to the schedule department where they are scheduled as to the time that they will reach the shipping platform, then into [fol. 41] the merchandise divisions where the stocks are carried where the merchandise is assembled and filled, and then conveyed to the assembly rooms where the various merchandise which customers order is assembled together into one container, packed or wrapped and labeled and stamped. From there on to the shipping department, either the postoffice or the shipping docks or other means of transportation.

Between 2,500 and 5,000 employees are engaged either directly or indirectly in the filling of orders and the Chicago mail order house serves Alabama, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Ohio, Tennessee and Wisconsin. The mail order plant at St. Paul, Minnesota, is like the Chicago house except it is not quite as large. I would judge it to be about 75% as large. It serves Iowa, Michigan, Minnesota, Montana, North Dakota, South Dakota and Wisconsin. The Kansas City mail order house is smaller than the Chicago house and larger than the St. Paul house. It serves Arkansas, parts of Iowa, Kansas, Missouri, Nebraska and Oklahoma.

An Iowa customer of the mail order department would either send in his order direct to the mail order house or give it to the desk clerk in one of the retail stores. The customer designates the method of transportation and he either remits at the time of the order or the order is sent

C. O. D. or the company extends credit. Where credit is extended, a minimum payment of not less than 10% of the selling price of the goods is required with the order. 10% of the company's mail order business is done on the installment basis. The company uses the service of a national reporting agency for reports on credit qualifications of a customer and the average rejections are 38%. Some orders are not filled for the reason that we do not have the mer- [fol. 42] chandise in stock or the customer fails to give specifications as to size or color, etc.

Offer: Mr. Ball: It is stipulated by and between counsel for both parties that Exhibit "I", being the notice served upon this company by the Iowa State Board of Assessment and Review, and received as indicated by the stamp on it, March 1, 1938, may be received in evidence.

Mr. Bookin: You have the order here, too, don't you?

Mr. Ball: Yes. It is also stipulated that attached to Exhibit "I" and forming a part thereof, is the resolution and order of the Iowa State Board of Assessment and Review consisting of four typewritten pages. It is also stipulated that this notice together with its attached copy of the order was served upon the legal representative of this company on the 28th day of February, 1938.

Q. What is the fact as to whether or not Montgomery Ward & Company holds a permit issued under Section 11 of the Iowa Sales Tax Law, as a retailer?

A. They do hold such permit.

Q. What is the fact as to whether or not the company does any act within the State of Iowa with respect to sales which are made in response to orders received by mail directly from Iowa customers?

Mr. Bookin: Will you read that question?

(Last question read.)

Mr. Bookin: Objected to as incompetent, irrelevant and immaterial to any issue in this case.

A. They perform no act in the State of Iowa.

The Company maintains no detailed records of sales made to individual customers, and the records which are actually kept by the company at its mail order houses serving Iowa residents, or the records kept at the home office

relating to the operations of these mail order houses, do not permit any segregation of sales of merchandise to Iowa [fol. 43] customers or the segregation of sales of merchandise which are used in the State of Iowa. For every customer from which an order is received an index card is created on which the customer's name and address is cut by a stencil cutting machine and the other part of the card is lined for recording frequency of orders, etc. This is the only card kept that includes the names of cash customers. All other papers relating to the order are returned to the customer and the amount of the sales to a particular customer appearing on the stencil card might not necessarily be the same due to omissions, changes in price, substitutions, or credit rejections. The index card is prepared and filled, and because of errors, omissions credit rejections and changes in price, I would state the index does not show a record of the sales.

In order to collect Iowa Use Tax on orders sent by customers direct to our mail order house serving Iowa customers, it would necessary for the company to train the personnel as to what items are taxable under the Iowa Act, change the accounting methods in order to keep an accurate record of taxable sales by state and customers and to establish a record not now maintained of sales by states. Such a record would have to be in the mailing and opening and billing departments. The maintenance of such records would require additional handling of orders in the billing department, the credit department and the adjustment department and in the accounting and statistics departments and the supply department.

The index cards do not show the record of adjustments or returns as they are kept for the purpose of determining whether or not to mail the customer a catalog. It would not be possible to keep the records indicated without setting up additional accounts and records.

[fol. 44] With regard to the prices of items sold by the mail order house and the retail store, I would say that the retail prices are higher than the mail order prices on the same items of merchandise. It would require time to give a receipt to Iowa customers and add much additional time to the time now required to fill orders. At the present time an order goes through the mail order house in four and one-half hours and there is direct relation between the

length of time required to fill an order and the number of complaints made by customers. Customers are dissatisfied with delay.

Q. In the course of the operation of the company's business have any studies been made from the records of the company attempting to show that relationship?

A. They are constantly made and maintained.

(A chart here marked and presented and marked Plaintiff's Exhibit "J".)

Q. I hand you what the reporter has marked Exhibit "J", and ask you if you know what it is? Just answer yes or no.

A. Yes.

Q. What is it?

A. It is a chart showing the relation between the service—time service on order and the complaints from customers.

Q. Now, in referring to service on orders I notice that chart Exhibit "J" has various figures running from 55 to 95. What are those figures representing?

A. Represent the percentage of orders filled on the same day that they are received.

Q. And I notice that under the heading of percentage of complaint are various figures running from 2.50 to 4.50, and I ask you what those figures represent?

A. That is the percentage of complaints to the number of orders.

[fol. 45] Q. And do you know how this chart came to be prepared?

A. This chart was prepared at my request when the percentage or orders on the same day received went down low, in order that I might prove to the operating department that the cost of the slow service was greater than the economy in having a banker carry-over.

Q. And from what records was that chart prepared?

A. The sales and complaint records.

Q. And under whose supervision are those records kept?

A. My own.

Q. And are you personally familiar with those records?

A. I am.

Q. And does this chart form a part of the records of the corporation which you keep and cause to be prepared under your supervision and control?

A. It does.

Q. And do those charts truly represent the actual figures shown by the other records of the corporation?

A. They do.

Offer: Mr. Ball: We now offer in evidence Exhibit "J".

Mr. Bookin: Exhibit "J" is objected to as incompetent, irrelevant and immaterial to any issue in this case; it is objected to as being the result of an opinion or conclusion of the person or persons who prepared the same, a conjecture or speculation on their part; that there was some necessary relationship between service on orders and the percentage of complaint, no foundation laid for assuming that there was any necessary relationship or that certain other elements including the changeability of persons making the order, and various elements of that type, might not otherwise [fol. 46] be responsible; it is a hearsay statement, it is not the best evidence and it has not been properly identified.

The handling of complaints entails cost to Montgomery Ward & Company and on the average no profit is made on orders that result in complaints because the margin of profit is too small. If the percentage of complaints to the total business increase, there would be a corresponding reduction in the profit of the company. Slowing up of the handling of orders does increase the number of complaints. This would decrease the profit.

I have made a study of catalogs and literature put out by other companies engaged in the sale of merchandise through mail orders, and I am familiar with the catalogs of Sears, Roebuck & Company and with the Chicago Mail Order Company and with those issued by Spiegel, May, Stern & Company and with those issued by National Bellas-Hess Company of Kansas City. In the main, the merchandise listed in those catalogs is comparable to the merchandise listed in the Montgomery Ward Catalogs and the majority of it is identical. Spiegel and The Chicago Mail Order Company are located in Chicago. The National Bellas-Hess Company is located in Kansas City. Neither of them operate a mail order house in the State of Iowa. Many remittances to the other mail order houses are sent in envelopes addressed to Montgomery Ward & Company and our practice is to turn them over to the mail order house for which they were intended. The catalogs between the mail order houses are

very competitive and a substantial number of customers deal also with the other mail order houses. The surveys show that approximately 60% of the customers who have a Montgomery Ward & Company catalog also have the catalog of one of the main competitors. The cost of printing a separate catalog for Iowa customers containing different [fol. 47] prices than those quoted to other customers in other states would be prohibitive. All changes from standard pages makes the printing cost very expensive. There would be no means available to us as a mail order company of increasing the price to customers in a particular location other than by printing a separate catalog showing separate prices. The customer's order is made out from the catalog and the price in the catalog is the one we are bound to respect. It would be possible to cover the cost of collecting the Iowa Use Tax without printing a separate catalog for Iowa customers. The sales are disappointing whenever an article in a catalog issued by Montgomery Ward & Company is priced fractionally above the price at which similar merchandising appearing in the catalog of other competing companies is priced. If Montgomery Ward has to collect the tax and its competitor does not, the effect would be to reduce the sales of Montgomery Ward and increase the sales of the competitor who was not required to collect the additional fee from the customer.

On August 1, 1938, there were 598 Montgomery Ward & Company stores throughout the United States. Some of these stores operate in states adjacent to the State of Iowa but have trade areas extending over into the State of Iowa, such as stores located at Maryville, Missouri, Nebraska City, Nebraska, Sioux Falls, South Dakota, Worthington, Fairmont, and Austin, Minnesota, Moline, Illinois. Merchandise is sold on credit to customers of these stores who live in the State of Iowa and delivery receipts for deliveries of merchandise from these stores show that some merchandise was delivered to Iowa customers. Montgomery Ward & Company has not collected any taxes levied by the State of Iowa either upon the sale of merchandise or on the use of the merchandise so sold. These stores keep no records [fol. 48] of customers who purchase for cash except in the few cases where deliveries are made.

In the border towns there are merchants in the town selling to the same trade area.

Mr. Ball: I think at this time you want to introduce that

record you have there. Why don't you stipulate to put it into the record at this time?

Mr. Bookin: That is agreeable to me. Let the record show preliminary proof and identification being waived, it is hereby stipulated that * * *

(Statement of corporation, etc., registered under Iowa Use Tax, etc., here marked plaintiff's Exhibit "K".)

Mr. Bookin: Plaintiff's Exhibit "K", consisting of 18 typewritten pages, and being a record of the domestic corporations registered under the Iowa Use Tax Act, of the foreign corporations registered under the Iowa Use Tax Act, of the out of state firms, not corporations, registered under the Iowa Use Tax Act, of the mail order houses registered under the Iowa Use Tax Act, of the Iowa residents, not corporations registered under the Iowa Use Tax Act, and of the out of state firms, not corporations, registered under the Iowa Use Tax Act, and the respective amounts collected from Iowa citizens and paid to the State Board of Assessment and Review, from the inception of the act, down to June 17, 1938, is to be received in evidence.

Is that all right, Stuart?

Mr. Ball: That's fine.

The Court: Are you offering that now?

Offer: Mr. Bookin: Yes.

Mr. Ball: He is offering that now.

There would be no way to recover the cost of collecting use tax on sales made in these border stores to Iowa customers other than to raise the price of the goods. Since prices in these border stores are maintained on a com-
[fol. 49] petitive basis, any increase in price would reduce the sales, resulting in a reduction of profit.

Q. In the course of your testimony you referred to the schedule of the orders handled in the mail order house. Will you explain a bit more fully what is meant by the schedule?

A. Economy in the operation of a mail order house results from what is called line production, the same as a factory. To avoid typing names and addresses and to facilitate the filling of the orders a system has been devised which makes it possible to send the typed entry sheets from the schedule unit to the various merchandise departments to be filled, and returned to the assembly room and packing floor,

and there be matched up together without the use of the customer's name but simply by the schedules. The schedule is made to each basket in each section of one customer's order every twenty minutes. When the schedule time elapses all of the articles of merchandise that that customer has ordered, regardless of what department it came from are supposed to be assembled in that basket. They are then checked to determine if this is so. If it is, the order is prepared for shipment; if not, the order is delayed until the missing article can be obtained. The delays of course take up space for storing the basket while the missing article is being obtained from the department, and the expense of such handling. The schedule is compared best to the movement of the belt or line or conveyor in a factory that moves at a certain speed and as it passes the workman he does his part, or inserts his bolt as it is passing. By the method of schedule you control the output not only of the house but the output—man hour output of the various individuals working on schedule activities.

No employee of the mail order house lives within the State of Iowa and there are no acts done within the State [fol. 50] of Iowa in regard to any of the orders sent to the mail order house. The company has no means of collecting any amounts or sums, or any machinery presently set up for collecting any sums from Iowa customers by individuals within the State of Iowa, and it would not be possible to do that without increasing the expense of the operation of the mail order business.

I am familiar with the merchandise which is carried in many of the communities in Iowa by other merchants other than by Montgomery Ward & Company and in most of the stores the merchandise is very competitive with the type sold by Montgomery Ward & Company and there is a competitive relationship between the mail order business and business conducted by local retailers in the State of Iowa.

Mr. Ball: It is stipulated and agreed between counsel that Exhibit No. "K" lists all of the corporations, firms, partnerships and the like under the various classifications, which have taken out licenses or which have done any of the acts indicated by the lists themselves, and it is further stipulated and agreed that neither Spiegel, May, Stearn or Spiegel, Incorporated, or the Chicago Mail Order Company, or the National Ballas-Hess Company have taken out any license

—are in any different position today than they were at the time this list was made out?

Mr. Bookin: Yes.

Cross-examination.

I am to some extent familiar with the policy of our retail stores with regard to advertising and I think it is true that such advertising stresses the fact that those articles of merchandise not carried in the store will be ordered by the store for the customer through the use of the catalog. The retail advertising manager gives direction to the retail [fol. 51] stores as to the type of advertising that they shall do. I have never been in the advertising department. I do not know whether the advertisements solicit orders from customers to be shipped from the mail order division.

If a customer purchased merchandise through an Iowa store to be shipped direct to him by mail order, the order being transmitted by the Iowa store, a stencil would be made for the particular customer, if one was not already on file, and if his purchase were sufficient to justify a catalog, one would be mailed to him.

The Delaware Corporation was the first corporation qualified to do business in this state, but this was eliminated when the corporation qualified to do business in this state. With regard to mail orders placed with the store, Montgomery Ward & Company is collecting and paying the use tax. I do not know exactly when this procedure was taken with relation to the original enactment and operation of the Use Tax Act, nor do I know whether the tax is being paid under protest. I have visited the Sioux City store, but I do not believe I have been in any other stores in Iowa.

Exhibits "B", "C" and "D" are the regular spring and summer catalogs for 1938 and in addition to the actual summer catalog some have tip-offs pasted thereto used to convey information to the customer, that is a necessity which is evident after the printing of the catalog.

(A slip attached to Exhibit "C" here marked defendants' Exhibit "C-1".)

Q. May I call your attention to Exhibit "C-1" and ask you if you know what that is? Do you know what that is, Mr. Vaught?

A. Yes.

Q. What is it?

[fol. 52] A. That is a notice to the customer that we are not collecting the Iowa Use Tax.

Q. Was that notice attached as a tip-on, attached to all the catalogs distributed or only to the catalogs distributed in the State of Iowa?

A. I don't know, but it would be my understanding that it would not be necessary to send that tip-on to the catalogs distributed in other states. It is a message to Iowa prospective customers.

Q. How was it possible for your company to get away from this intense standardization you employ to which you testified and segregate the catalogs that went to your Iowa customers for the purpose of placing that tip-on as to those particular catalogs?

A. The catalogs that are mailed into the State of Iowa to Iowa customers had the tip-on put on as an additional activity.

The names of people to whom to mail the catalogs in Iowa were secured from the index or stencils and the index division is segregated into states and into post offices. Eighteen per cent of the total business is credit business. By combining the index with statistics prepared concerning the mail order (credit) business, the amount of the Iowa mail order business could be approximated. Between 85 and 90% of the customers use the order blank or follow the instructions in the catalog in writing the orders, but I do not think the amount of the Iowa business could be definitely established from the statistical data in the mail order department. The State of Missouri has a sales tax, but we do not issue and publish a separate catalog for that state. The State of Texas has no sales tax and we do not publish a separate catalog for that state. The State of Colorado has a sales tax, but we do not publish a separate catalog for that state. I do not know whether the State of California [fol. 53] has a sales tax, but as a matter of fact we do not publish a separate catalog for any state in which we have a mail order house and which state levies a sales tax. With regard to the Illinois sales tax on those orders received from Illinois customers through the mail direct from the customer to the mail order division, we use a separate order blank and a tip-off as a reminder. The order blank has the space for the state sales tax. The order blank shows a space for the tax. In those states where there is a sales tax we have not found it necessary to publish an entirely dif-

ferent catalog, nor have we found it necessary to raise the price of merchandise. I do not know whether we have any catalog stations or places where a desk is maintained with a catalog and an employee of Montgomery Ward & Company is present to assist persons in filling out their mail orders in the State of Iowa or not. We have over a hundred such offices and I would presume that we had such an office in Iowa. The corporation, Montgomery Ward & Company pays the clerk operating a catalog station and my statement this morning to the effect that there are no employees of the mail order house located in Iowa would be incorrect if there are catalog stations located in the State of Iowa. There is, I know, a catalog station in each retail store in Iowa and the store is paid a commission by the mail order department for the expense connected with the employment and wages of the person in the catalog station. This commission plan has not been abolished. I believe the commission is seven per cent of whatever order is received or sent in, and it is credited to the income of the store and the manager's bonus is determined on the basis of the income of the store. Because of this commission the managers of the retail stores attempt to obtain as many mail [fol. 54] order customers as possible. We have attempted to get as many mail order sales through the service desks in the retail stores as we can.

Q. How do you keep a record of your Illinois sales tax on your mail orders from the State of Illinois?

A. The order readers—first, the mail opener if she sees that there is an Illinois address on the order puts the order in a different colored jacket as a flag, to the billing department and the other departments to notify them that that is an Illinois order and must have special handling, and when the order is filled and the billing is done the billers make tabulation of the amounts of the final sale on tabulating sheets that are recapitulated by the accounting department for the final figure. The adjustment department makes record of the sales deductions resulting from returned goods so that may be deducted. I do not know how much time a micromotion study would disclose in connection with this additional work to collect the Illinois tax. Studies have been made to determine the cost.

With regard to the testimony I gave that sixty per cent of the customers who have Montgomery Ward catalogs have catalogs of one or more of our competitors, I will state that

the testimony was based on reports of surveys done by the sales department. I do not know anything about the accuracy of those surveys and they were not done under my supervision and practically everything I testified to was some report somebody had handed to me. I know of nothing that would prevent our company from furnishing the necessary instructions on order blanks concerning the necessity of Iowa customers paying the Iowa use tax. It could be printed just as we print the tip-on telling them that we believe certain parts of the Iowa use tax are unconstitutional and therefore we neither collect nor report the use tax. We could print the converse of that and tell them that thereafter it would be the intention of Montgomery Ward [fol. 55] & Company to collect and pay the use tax. We find from experience that 90% of our customers follow the instructions contained in the order blank. I did not testify this morning that a separate catalog would have to be printed for Iowa if the use tax were to be collected and I did not testify that we would have to raise the price of merchandise sold to Iowa customers if we were required to collect the use tax. I did testify that we would have to raise the price if we incurred the additional expense in collecting the tax if we wished to make the same profit on the transaction. I do not know whether we make the same profit on our Illinois sales as on our Iowa sales. We do collect the tax in Illinois, but we do not know what we make in any one state. The purpose in adding this tip-on to the catalogs was to convey the message therein contained and not for the purpose of intimating to Iowa customers that by mailing their orders to mail order houses outside the state they would be able to secure a two per cent differential over purchases that they might make within the state. In the main, merchandise in our retail establishments is higher priced than identical merchandise maintained in the mail order house. The reason for this is that on the merchandise in the retail store we pay the carriage or transportation charges to the store while in the case of mail order purchases the customer pays the transportation, and a retail service is more expensive than the mail order service. The store managers in their report each week tabulate the value of the orders sent in and the seven per cent commission is in the form of a journal voucher charged and credited to the store each month.

Mr. Ball: It is stipulated by and between counsel that the record may show that Montgomery Ward operates one of two mail order offices within the State of Iowa independent from the retail stores operated in the State of Iowa, and [fol. 56] that the sales made through such order offices have, together with the sales made through the order desks in the retail stores in the State of Iowa, been reported to the state and the use tax thereon collected and returned, since the beginning of the year 1938, and that all payments in connection with such returns, the use tax has been paid under protest.

Redirect examination:

These added records of sales where use tax would be collected would slow up the process of filling the mail orders. Each additional bit of work requires additional people to handle and additional space. In handling the Illinois sales tax no use is made of the index in computing the amount of the sales tax. It is computed from the tabulations made by the billing clerks after the order is filled. Sometimes catalogs are distributed with tip-ons in order to secure a test, that is certain information would be contained on the tip-on and some sent with tip-on and some without and a test of the returns made. To change the printing of order blanks would cost money and there would be an added expense in the insertion and segregation of books containing one order blanks as against another.

Recross-examination:

The tip-on is located close to the order blank and I imagine one having recourse to the order blank could see it.

Redirect examination.

The more difficult an order is to fill the greater is the resistance to the order.

[fol. 57] J. H. Schneider, called as a witness on behalf of the plaintiff, having been duly sworn by the Court, testified as follows:

Direct examination:

I live at Winnetka, Illinois and I am the head of the tax department of Montgomery Ward & Company. I com-

menced work for Montgomery Ward on October 1, 1929, prior to which time I was a certified public accountant. I was general auditor from 1933 to 1935 and since 1935 have been head of tax department. A separate tax department was started in 1935 and I am responsible for the preparation of all sales, use, income and other excise tax returns and the making of tax payments and the supervision of all accounting data necessary in order to prepare the tax returns. It is necessary for my department to issue detailed procedures to the various branches, particularly in the collection of sales tax in order to enable them to administer properly the collection of the sales tax. Illinois has a sales tax and Montgomery Ward & Company attempts to collect an amount to cover the increased cost from that business resulting from the imposition of this tax. The Illinois tax went into effect in 1933 and it is in the nature of a tax on the retailer rather than on the customer which means that any collection must be made in the form of an addition to the sales price in order to be compensated for the expense of paying the tax. When I stated that Montgomery Ward & Company attempted to collect an amount to cover the increased cost of doing business resulting from the imposition of this tax I meant the increase resulting directly from the tax and not the increase in the cost of business resulting from the collection. We attempted to do this by placing a tip-on similar to what we have in these catalogs on the catalog sent to Illinois customers and about a year later we found it slightly more economical to put this same tax [fol. 58] notice on the order blank that we placed in the back of the catalog, and in order to facilitate the computation of the tax we placed a little schedule bracket familiar in sales tax states. There has been no change in the method of presenting that notice to the Illinois customers. We found that after this notice was sent to the Illinois customers that only 75% of them sent in an amount to cover this additional tax. That experience has remained the same. When an Illinois customer fails to remit an amount to cover the tax, we do not withhold the filling of the order but we send a due bill for the deficiency and our records show that 58% of the due bills issued are not collected. The procedure is that in all deficiencies less than two cents no due bill is sent. The larger the amount of the individual due bill the greater portion of them will be collected and conversely the smaller the

amount of the due bill the greater the proportion that won't be collected. Basing my answer on my experience in the handling of Illinois Retailers Occupation Tax and assuming the tax on the use of merchandise ordered by Iowa customers from one of the mail order houses serving Iowa residents amounted to $10,000 for a given period, I would state that Montgomery Ward would be able to collect $8,550.00. I have made a study of other states relating to the cost of the collection of sales tax in those states having such a tax and the procedure used in handling the sales tax in those states is identical to the procedure in Illinois and the studies I have made corroborate my statement concerning the estimate of the cost of collecting the Iowa use tax under the Chicago, Illinois mail order house. Based upon my general experience in the collection of sales taxes, I would state that in my opinion the amount of tax collected of a possible $10,000 in Iowa use tax would not exceed $8,550.00. The procedure in the collection of sales tax in all states having [fol. 59] such a tax has been set up under my supervision and if we were to collect a use tax in Iowa, we would have to set up an operating procedure practically identical with the system we are now using for the collection of local state sales tax.

EARL RYAN, was called as a witness on the part of the plaintiff and being first duly sworn by the Court, testified as follows:

Direct examination:

I am in the employ of the Secretary of State, examining corporation securities for the Corporation Securities Department and I have charge of the supervision of corporation records in that office. I pass upon corporations that are qualified or incorporated under the laws of Iowa and pass upon application of foreign corporations licensed to do business in the State of Iowa. I have made an examination of the records in the Secretary of State's office and I am able to testify that the Chicago Mail Order Company is not licensed to do business in the State of Iowa as a foreign corporation. The Spiegel Stores Company in Chicago is not licensed to do business in the State of Iowa as a foreign

corporation. The National Bellas-Hess Company is not authorized to do business in the State of Iowa as a foreign corporation. None of these corporations are Iowa corporations.

Examination of Mr. Ryan.

By the Court:

The National Bellas-Hess Company was at one time qualified as a foreign corporation to do business in this state but they filed an affidavit of withdrawal August 4, 1938, and have not been authorized to do business in Iowa since that time.

[fol. 60] J. H. SCHNEIDER, resumed the stand for further examination, and having been previously sworn by the Court, testified as follows:

Direct examination:

The statement that $8,550.00 on the basis of $10,000 of Iowa use tax would be collected includes the additional amount sent Montgomery Ward & Company in response to due bills sent to customers. If a tip-on was used, additional cost would arise in the mail opening department and book and billing departments, adjustment department, the time payment installment unit, the accounting and statistics department and general mail order accounting department which would amount to $938.00. Therefore, the total cost would be made up of the items of direct cost in the sum of $938.00 and indirect cost of $1,450.00 which latter figure is the difference between $10,000 and $8,550.00, or a total cost of $2,388.00. The earliest date upon which Montgomery Ward could start collecting the Iowa use tax by means of the tip-on method would be at the time of the issuance of our next general catalog, on January, 1939. If, instead of the tip-on method, a notice was printed on the order blank the cost would be $890.00 or somewhat less than the other method. This would reduce the total cost to $2,340.00 made up of the same elements as previously enumerated with the slight reduction due to the economy of placing the tax notice on the order blank rather than issuing a separate tip-on.

If neither the notice on the order blank nor tip-on in the catalog method were used and collections were made solely by sending out due bills to customers, then based on the Illinois experience, only 42% of the due bills would be collected. If this method were followed of merely sending out due bills the direct cost would be $1,040.00 plus an indirect cost of $5,800, or a total cost of $6,840.00. If this were the only [fol. 61] method used, the cost would be prohibitive. The Illinois Retailers Occupational Tax makes Montgomery Ward & Company liable for the entire amount of the tax of all of its customers. Identical procedure would have to be used in the collection of the Iowa taxes and the cost would be very much the same. The Montgomery Ward retail stores collect over 99% of the tax and the cost of the collection of this tax would not exceed five per cent of the amount of the sales tax collected. It would not exceed six per cent of the total amount of the tax collected or $600.00 for every $10,000 worth of tax. The index system has not had anything to do in any way in calculating the amount of the Illinois Retailers Occupational Tax paid by Montgomery Ward & Company.

Cross-examination:

A record is kept of due bills set out in various classifications. No record is kept of the particular customer to whom the due bill is sent except that a total record is kept of amounts over 25 cents on all due bills. A follow-up notice is sent to customers on all due bills over 25 cents, but nothing further is done with regard to those from 25 cents to a dollar, but more effort is placed in collection of those for more than a dollar. Intervention of local stores is not used in collecting due bills. The retail stores do aid in the collection of credit accounts where the customer has indicated a desire to make payments at the store. I do not know whether ordinary collections are made on credit accounts of the mail order division by the stores.

STIPULATION

Mr. Ball: It is stipulated and agreed between counsel:

1. That advertisements have been caused to be printed by the retail stores of the petitioner in the State of Iowa, ad-

[fol. 62] vertising not only retail merchandise, but the ability to complete service through the use of the catalog.

2. That the cancellation of the petitioner's license to do business in the State of Iowa as a retailer, would cause irreparable injury to the petitioner, through the loss of customers' trade, good-will, and so forth, occasioned by the cessation of the store business, and that result would be obtained through the cancellation of the permit to do a retail business, or to engage in business as a foreign corporation.

Mr. Bookin: And,

3. That retail stores are instructed to include in their advertising information to the public relative to the availability of the catalog service at the stores.

Mr. Ball: Let the record show that all of the petitioner's Exhibits "A" to "K" inclusive, that might not have been previously formally offered, are not at this time offered in evidence.

The Court: Exhibit "C-1", notice to customers that we are not collecting use tax, has not been offered.

Mr. Bookin: I now offer in evidence in connection with the testimony of Mr. Vaught, defendant's Exhibit "C-1", being tip-on attached to the rear of Exhibit "C", or attached to the inside cover of Exhibit "C".

Mr. Ball: It may also be shown as a stipulation that similar tip-ons appear in the back of catalogs Exhibits "B" and "D", and were used in connection with the distribution of the spring and summer catalogs for the year 1935 to Iowa customers.

* * * * * * *

STIPULATION

Mr. Bookin: It is stipulated by any between counsel that the records will show that Montgomery Ward & Company made its first use tax return on April 20, 1938, for the quarterly period beginning January 1, 1938, and through [fol. 63] March of 1938 and that said quarterly return was made at the time of or subsequent to the institution of the present action and that the return made covered only such sales of merchandise to the Iowa customers with which

their stores located in the State of Iowa had had some connection and sales made by order offices, if such order offices were in operation.

* * * * * * *

Mr. Ball: It is stipulated between counsel that at the present time order offices are operated by Montgomery Ward & Company at Osage, Charles City, Atlantic and Red Oak, Iowa, and that matter of handling the salaries of the employes of those order offices is as indicated by the testimony of Mr. Vaught, and that the sales made by these order offices are included in the use tax returns made subsequent to the opening of any of them——

Mr. Bookin: If such returns have been made.

Mr. Ball: If any such use tax returns have been made.

Evidence closed.

DESCRIPTION OF PLAINTIFF'S EXHIBITS, "A" TO "K" INCLUSIVE

"A"—Certified Copy of Application of Montgomery Ward & Co., to Secretary of State for authority to transact business in Iowa as a foreign corporation.

"B"—Catalogue—Spring & Summer, 1938—For Chicago.

"C"—Catalogue—Spring & Summer, 1938—For St. Paul.

"D"—Catalogue—Spring & Summer, 1938—For Kansas City.

"E"—Catalogue—Fall & Winter, 1937-38—For St. Paul.

"F"—Catalogue—Fall & Winter, 1937-38—For Chicago.

[fol. 64] "G"—Catalogue—Fall & Winter, 1937-38—For Kansas City.

"H"—Form of Order Blank used in all general catalogues and all others from Iowa Use Tax date to present.

"I"—Notice served on Company by Board of Assessment & Review.

"J"—Chart showing relation between Time Service and Complaints of Customers.

"K"—Record of foreign corporations registered, and mail order houses, Iowa residents, etc., and amounts collected, to June 17, 1938.

[fol.64] EXHIBIT "K"

Part 1

Domestic Corporations Registered Under Section 8 of Iowa Personal Property Use Tax Law for Sales from Out-of-State Locations for Use in Iowa

Reg. No.	Name and Address	Tax Paid
100013	A. Y. McDonald Mfg. Co., Dubuque, Iowa	No Tax
100021	Beauty Utilities of Iowa, Waterloo, Iowa	$ 139.69
100045	Shotwell-Carver Co. Inc., Des Moines	262.26
100077	Consumers Coal & Supply Co., Dubuque, Iowa	No Tax (Canc.)
100078	L. W. Ramsey Co., Davenport, Iowa	11.49
100079	Clay Equipment Corporation, Cedar Falls, Iowa	No Tax
[fol.65]		
100080	Oskaloosa Ice Co., Oskaloosa, Iowa	No Tax (Canc.)
100081	Schoits Engineering Works, Inc., Waterloo, Iowa	No Tax
100082	City Coal Company, Albia, Iowa	No Tax (Canc.)
100083	Electrical Engineering & Cons. Co., Des Moines, Iowa	No Tax
100086	Drake Hardware Company, Burlington, Iowa	No Tax
100088	Fullmer Builders Supply Co., Ottumwa, Iowa	No Tax (Canc.)
100089	Citizens Service Company, Swea City	No Tax
100095	Farmers Grain Co., Larchwood, Iowa	No Tax
100097	Berry Lumber Co., Onawa, Iowa	No Tax (Canc.)
100098	Automatic Gravel Products Co., Muscatine, Iowa	No Tax
100099	Sibley Cement Company, Sibley, Iowa	63.29
100100	Shell Lumber Company, Sibley, Iowa	.98
100101	Will H. Zaiser Specialty Co., Des Moines, Iowa	No Tax
100102	The Mastercraftsmen, Inc., Des Moines, Iowa	No Tax
100103	Berkowits Envelope Co. of Iowa, Des Moines, Iowa	1.77
100104	The McGregor Company, Oskaloosa, Iowa	No Tax
100105	General Air Conditioning Corp., Cedar Rapids, Iowa	No Tax
[fol.66]		
100106	Castone Products Co., Cedar Rapids, Iowa	No Tax
100107	Tribune Publishing Co. Inc., Cedar Rapids, Iowa	No Tax
100108	The Luberger Company, Cedar Rapids, Iowa	No Tax
100109	H. Trenkle Co., Dubuque, Iowa	49.71
100110	Mets Manufacturing Co., Dubuque, Iowa	No Tax
100111	The National Yeast Co. Inc., St. Olaf, Iowa	No Tax

EXHIBIT "K"—Part 1—Continued

Reg. No.	Name and Address	Tax Paid
100112	Niemeyers, Hawarden, Iowa	No Tax (Canc.)
100113	Manning McComb Co., Des Moines, Iowa	No Tax (Canc.)
100114	Pure Ice Company, Centerville, Iowa	No Tax
100115	Amana Society, Amana, Iowa	No Tax (Canc.)
100116	Master Ref. Locker Systems, Sioux City, Iowa	No Tax
100117	T. R. Gurney Oil Company, Sioux City, Iowa	2.88
100118	The Phillip Bernard Co., Sioux City, Iowa.	1.75
100119	Johnson Biscuit Co., Sioux City, Iowa	No Tax (Canc.)
100121	Lehigh Sewer Pipe & Tile Co., Ft. Dodge, Iowa	24.18
100120	L. O'Harrow Co., Sioux City, Iowa	No Tax (Canc.)
100122	Chas. Naeckel's Sons Co., Davenport, Iowa	No Tax
[fol.67]		
100123	Sieg-Mason City Co., Mason City, Iowa	No Tax (Canc.)
100124	Palmer School of Chiropractic, Davenport, Iowa	172.32
100125	U. S. Broom Company, Inc., Davenport, Iowa	No Tax
100126	Coughlin Sales Company, Davenport, Iowa	No Tax
100127	Strieter Motor Company, Davenport, Iowa	No Tax
100128	Red Jacket Manufacturing Co., Davenport, Iowa	No Tax
100130	Omaha Standard Body Corp., Council Bluffs, Iowa	3.02
100133	Des Moines Steel Bldg. Co., Des Moines, Iowa	1,100.71
100136	Luana Farmers Coop. Society, Luana, Iowa	No Tax
100137	Uehtorff Weiser Co., Davenport, Iowa	109.81
100138	Florida Fruit Co., Dubuque, Iowa	No Tax (Canc.)
100139	Ben S. Noble Lumber Co., Ida Grove, Iowa	No Tax
100140	Rainbow Oil Co., Dubuque, Iowa	No Tax (Canc.)
100141	Kruber-Morgan Elec. Co., Cedar Rapids, Iowa	No Tax (Canc.)
100142	Star Spark Arrestor Co., Oskaloosa, Iowa.	No Tax (Canc.)
100143	Riverside Fuel Co., Davenport, Iowa	No Tax (Canc.)
[fol.68]		
100144	Kelling Wilkinson Oil Co., Davenport, Iowa	1.24
100147	Bartles-Shepherd Oil Co., Waterloo, Iowa.	59.49
100153	Johnson Service Company, Des Moines, Iowa	33.99
100161	The Advertising Novelty Co., Newton, Iowa	No Tax

Exhibit "K"—Part 1—Continued

Reg. No.	Name and Address	Tax Paid
100297	Grand Recreation Corporation, Des Moines, Iowa	10.19
100298	Des Moines Incubator Co., Des Moines, Iowa	.21
100309	The Van Meter Co., Cedar Rapids, Iowa	No Tax
Total Amount of Tax Paid		$2,048.98
Total Number of Retailers		63

Part 2

Foreign Corporations Registered Under Section 9 of Iowa Personal Property Use Tax Law for Collection of Tax on Sales for Use in Iowa

Reg. No.	Name and Address	Tax Paid
100092	Dimock, Gould & Co., Moline, Illinois	$ 239.78
100151	Lewis Mfg. Company, Walpole, Mass.	No Tax (Canc.)
[fol.69]		
100155	Iron Fireman Corporation, Cleveland, Ohio	No Tax
100230	Farmers Co-op. Oil Co., Canton, S. Dak.	17.75
100231	M. Engebretson, Sioux Falls, S. Dak.	No Tax
100238	The Texas Company, Lawrenceville, Ill.	11.62
100242	Paul Oldenburg Co., Elmore, Minn.	No Tax
100248	Producers Creamery of Moline, Moline, Illinois	228.86
100288	C. A. Dunham Company, Chicago, Illinois	347.59
100350	The Gregory Laboratory, White Hall, Ill.	18.95
100356	Ashe Lockhart, Inc., Kansas City, Mo.	1.59
100361	Haver-Glover Laboratories, Kansas City, Mo.	1.00
100368	Lyons Band Instrument Co., Chicago, Ill.	No Tax
100382	Claude Neon Federal Co., Chicago, Ill.	No Tax
Total Amount of Tax Paid		$ 867.14
Total Number of Retailers		14

[fol.70]

Part 3

Out of State Firms (not Corporations) Registered for Collection of Tax under Sections of Iowa Personal Property Use Tax Law

Reg. No.	Name and Address	Tax Paid
100055	Associated Sales Distributors, Minn., Minn.	$ 31.12
100063	Matthews Shirt Co., Chicago, Ill.	158.15
100292	C. C. Anker, Chicago, Ill.	4.19
100306	Harold Griffith, Livonia, Mo.	2.35 (Canc.)
100311	Manitowoc Knitting Mills, Manitowoc, Wis.	15.09

Exhibit "K"—Part 3—Continued

Reg. No.	Name and Address	Tax Paid
100312	Edwin C. Barnes & Bros., Chicago, Ill.	No Tax
100352	Cleveland Studio, Omaha, Nebr.	No Tax
100377	D. D. Tarpy, Omaha, Nebr.	No Tax
100383	Hand Tooled Leather Co., Rockford, Ill.	No Tax
100388	Quincy Leather Company, Quincy, Ill.	No Tax
Total Amount of Tax Paid		$ 210.90
Total Amount of Retailers		10

[fol.71] Part 4

Mail Order Houses Registered Under Section 8 of Iowa Personal Property Use Tax Law but not Included in Statement for Foreign Corporations Operating Under This Section

Reg. No. 100006
Montgomery Ward & Co.
Chicago, Illinois

B-37	$ 8.38
C-37	116.50
D-37	80.31
A-38	1,339.56
Total	$1,544.75

Reg. No. 100366
Sears, Roebuck & Co.
Chicago, Illinois

B-37	$1,474.48
C-37	1,621.71
D-37	2,602.64
A-38	2,154.19
Total	$7,853.02

[fol.72] Part 5

Iowa Residents (not Corporations) Registered Under Section 8 of the Iowa Personal Property Use Tax Law for Collection of Tax on Sales for Use in Iowa

Reg. No.	Name and Address	Tax Paid
100001	John M. Dunkerton, Des Moines, Iowa.	$ 52.47
100008	B. & M. Service Co., Des Moines, Iowa.	254.50
100019	Movie Photo Co., Des Moines, Iowa.	12.42
100036	Emory Jones, Des Moines, Iowa.	320.10
100049	Nowlin's Distributing Co., Des Moines, Iowa.	144.43
100066	Iowa Road Blg. Co., Des Moines, Iowa.	1,273.32
100069	Harry Waite, Hawarden, Iowa.	46.73
100152	Mrs. Elsia H. Carle, Muscatine, Iowa.	No Tax
100154	Miss Edith J. Cranston, DeWitt, Iowa.	5.53
100156	H. P. Braun, Des Moines, Iowa.	4.89
100157	V. V. Wonderling, S. Sioux City, Neb.	1.95

EXHIBIT "K"—Part 5—Continued

Reg. No.	Name and Address	Tax Paid
100160	The Vernon Company, Newton, Iowa...	No Tax
100162	R. W. Eldridge, Waterloo, Iowa.....	10.63
100168	Mr. and Mrs. Fred Merritt, Mapleton, Iowa.....	1.34
100169	W. H. Orr, Clear Lake, Iowa.....	8.71
[fol.73]		
100172	C. W. Stipp Co., Des Moines, Iowa....	No Tax
100173	Miss Katharine Martin, Des Moines, Iowa.....	2.87
100175	Mrs. Nina B. Sugg, Clinton, Iowa.....	15.21
100176	Mollie Hird, Dubuque, Iowa.....	3.85
100177	Zita L. Baker, Cresco, Iowa.....	4.80
100174	Mrs. G. D. Suter, Des Moines, Iowa....	1.85 (Canc.)
100180	Mrs. A. F. McCoy, Lanesboro, Iowa...	6.42
100181	Mrs. H. D. Patterson, Nevada, Iowa...	6.21
100182	Miss Grace Negus, Reinbeck, Iowa....	4.23
100183	Nora Dundore, Perry, Iowa.....	1.77
100184	Mrs. Verva Bixler, Clarence, Iowa.....	8.58
100185	Blanche L. Paul, Muscatine, Iowa.....	17.79
100186	Ruth V. Adams, Marshalltown, Iowa..	7.13
100187	Mrs. Henrietta H. Burnham, Griswold, Iowa.....	2.35
100188	Bertha L. Marsh, Cherokee, Iowa.....	10.26
100189	Elsie McNiel, Cedar Rapids, Iowa.....	5.87
100190	Johanah Larsen, Onawa, Iowa.....	2.60
100191	Mrs. J. L. Stewart, Maquoketa, Iowa...	5.14
[fol.74]		
100192	Lillian Huntington Lockwood, Waterloo, Iowa.....	6.54
100193	Miss Laura M. Pedersen, Des Moines, Iowa.....	7.90
100195	Mrs. Marie T. Douglass, Cedar Rapids, Iowa.....	4.84
100196	Mrs. Lela O. Kish, Riverton, Iowa.....	1.45
100197	Mrs. Curtis Sutton, Anamosa, Iowa.....	7.68
100198	Belle C. Collett, Ottumwa, Iowa.....	2.20 (Canc.)
100200	Mrs. Cora H. Hill, Badger, Iowa.....	3.88
100202	Mrs. Ralph Janssen, Ackley, Iowa.....	3.65
100203	Anna Fitzgerald, Pocahontas, Iowa.....	3.18
100204	Estelle E. Claussen, Clinton, Iowa.....	3.55
100206	Mrs. O. M. Bundy, Cedar Rapids, Iowa.	6.05
100207	Mrs. Grace Collins, Monmouth, Iowa...	4.36 (Canc.)
100208	Mrs. Minnie Meier, Waukon, Iowa.....	2.19
100209	Mrs. Rose Severson, Davenport, Iowa..	No Tax
100210	Mrs. Pearl Edwards, Marengo, Iowa....	14.67
100211	Margaret Shanewise, Waverly, Iowa....	6.51
100212	Ferna E. Leeper, Newell, Iowa.....	5.66
[fol.75]		
109214	Mrs. Hilda Ruser, Bennett, Iowa.....	2.01
100216	Mrs. Bess Steinmetz, Muscatine, Iowa.	4.43

EXHIBIT "K"—Part 5—Continued

Reg. No.	Name and Address	Tax Paid
100217	Mrs. A. Lela Johnson, Waterloo, Iowa..	2.12 (Canc.)
100218	Thomas N. Naudain, Sioux City, Iowa..	18.20
100219	Mrs. E. L. Rhodes, Sioux City, Iowa....	9.32
100221	Miss Amanda Looft, Swea City, Iowa...	7.17
100222	Mrs. Angie B. Noble, Charles City, Iowa	35.69
100223	Mrs. Ida C. Bell, Sioux City, Iowa.....	13.86
100224	Miss Lena M. Johnson, Sioux City, Iowa	4.59
100226	Mrs. Ruth M. Edwards, Marengo, Iowa	17.75
100227	Mrs. Ruth Rice, Cedar Rapids, Iowa..	11.00
100229	Mrs. Lee McManes, Geneva, Iowa....	2.37
100232	Mrs. Geo. S. Klahm, Davenport, Iowa.	3.45
100233	Miss Minnie Harrison, Waterloo, Iowa.	6.43
100234	Mrs. Teresa Peterson, Davenport, Iowa	16.87
100236	Hasel A. Clyde, Osage, Iowa.....	10.13
100237	Kunie & Nelson, Malvern, Iowa.....	No Tax (Canc.)
[fol.76]		
100244	Mrs. Bess Adams, Iowa City, Iowa....	6.34
100245	George E. Krepelka, Osage, Iowa.....	9.79
100246	C. A. Kay, Centerville, Iowa.....	.12
100247	Luella Wall, Des Moines, Iowa.....	13.00
100251	Mrs. Anna Bentrude, Waterloo, Iowa..	2.52
100253	Daisy Haney, Keosauqua, Iowa.....	1.71
100254	A. B. Carstensen, M. D., Linn Grove, Iowa.....	1.89
100255	Mary Ellen O'Mara, Fort Dodge, Iowa	2.79 (Canc.)
100256	Mrs. W. P. Donald, Ames, Iowa.....	No Tax
100257	Mrs. Nelle C. Culver, Anthon, Iowa...	10.97
100258	Mrs. Clara Ford, Burlington, Iowa....	11.82
100259	Mrs. Gertrude E. Dow, Davenport, Iowa.....	7.68
100260	Margaret Bower, Marble Rock, Iowa..	7.38
100261	Mrs. Alice D. French, Des Moines, Iowa	11.84
100262	Marian M. Kemp, Muscatine, Iowa...	No Tax
100264	Mrs. Viola M. Haddad, West Union, Iowa.....	5.34
100265	Mrs. Clarence Van Wechel, Orange City, Iowa.....	3.95
100266	Mrs. R. C. Mahaffa, Des Moines, Iowa.	No Tax
100267	C. A. Merritt, Clarence, Iowa.....	8.21
[fol.77]		
100268	Nellie M. Du Mond & Margaret, Waterloo, Iowa.....	29.54
100269	D. M. Stewart, Chapin, Iowa.....	No Tax
100271	Mrs. Vera K. Findly, Iowa City, Iowa.	21.67
100272	Mrs. Nettie F. Wood, Council Bluffs, Iowa.....	12.43
100273	Mrs. E. C. Eastin, Ft. Madison, Iowa..	14.24
100274	Mabel Carney, Sioux City, Iowa.....	6.02
100276	Mrs. Ethel M. James, Columbus Junction, Iowa.....	No Tax

EXHIBIT "K"—Part 5—Continued

Reg. No.	Name and Address	Tax Paid
100277	Mrs. A. Dennison, Bellevue, Iowa	9.41
100278	Mrs. Helen Piffer, Indianola, Iowa	No Tax
100280	G. E. Offord, Clinton, Iowa	57.65
100283	Mrs. Mary Wilhite, Manning, Iowa	3.67
100284	Mrs. Delsie Berg, Fort Dodge, Iowa	No Tax
100285	Miss Effie Holt, Boone, Iowa	.37
100286	Mrs. Anna Schmidt, Davenport, Iowa	5.10
100287	Mrs. Frank Neely, Monroe, Iowa	5.22
100289	Mrs. Fay Mayo, Des Moines, Iowa	4.19
100290	Mrs. Henry O. Timmerman, Sheffield, Iowa	1.63
100291	Mrs. Laura Graham, Davenport, Iowa.	1.84
[fol.78]		
100293	P. A. Graf, Mason City, Iowa	11.47
100295	Mrs. Mabel Kirchgatter, Iowa Falls, Iowa	3.30
100301	Mrs. T. A. Bell, Anita, Iowa	5.39
100303	Mrs. Emma B. Richardson, Washington, Iowa	23.00
100304	Daisy C. Rees, Ottumwa, Iowa	5.83
100308	Mrs. Maude Runkle, Lisbon, Iowa	3.52
100310	Miss Mabel M. Merritt, Ottumwa, Iowa	No Tax
100313	Isabel Hora, Boone, Iowa	.71
100324	Mrs. Jessie Dunsmore, Mason City, Iowa	5.02
100325	Mrs. T. L. Rogerson, Eagle Grove, Iowa	1.27
100328	Fred Golden, Burlington, Iowa	23.03
100329	Mrs. Sarah T. Shaefer, Fort Dodge, Iowa	No Tax
100330	Mrs. Vae S. Hawker, West Liberty, Iowa	5.11
100344	Wiley Whitehead, Marengo, Iowa	5.85
100351	Mrs. Anna Roach, Mapleton, Iowa	6.01
100362	Anna T. Mueller, Davenport, Iowa	1.71
100364	Mrs. A. J. Preston, Muscatine, Iowa	1.71
100367	Mortuary Supply Co., La Porte City, Iowa	No Tax
[fol.79]		
100369	Mrs. Elda Poppleton, Sioux City, Iowa	1.60
100370	Mrs. Norine Bensmiller, Ottumwa, Iowa	3.14
100373	Mrs. Eleanor T. Severance, Sutherland, Iowa	No Tax
100375	D. B. Tuttle, Decorah, Iowa	No Tax
100378	Miss Gladys Campbell, Mt. Pleasant, Iowa	No Tax
100381	M. A. Bates, Seymour, Iowa	No Tax
100384	Mrs. John Block, Burlington, Iowa	No Tax
100386	Peter E. Greteh, Remsen, Iowa	No Tax
100393	Arthur E. Radabaugh, Colesburg, Iowa.	No Tax
100394	Mrs. June Hutchcroft, Mediapolis, Iowa	No Tax

Exhibit "K"—Part 5—Continued

Reg. No.	Name and Address	Tax Paid
100395	William Aberly, Riceville, Iowa	No Tax
100396	J. A. Jensen, Cresco, Iowa	No Tax
100397	Mrs. Art Kohl, Anamosa, Iowa	No Tax
100398	F. J. Merrill, Charles City, Iowa	No Tax
Total amount of tax paid		$2,880.15
Total number of retailers		136

[fol.80]

Part 6

Foreign Corporations Registered for Collection of Use Tax Under Provisions of Section 8 of Iowa Personal Property Use Tax Law

Reg. No.	Name and Address	Tax Paid
100002	R. C. A. Mfg. Co., Inc., Camden, N. J.	$ 327.25
100003	Ohmer Register Co., Dayton, Ohio	71.51
100004	Illinois Oil Co., Rock Island, Ill	578.25
100005	Westinghouse Electric Elevator Co., Chicago, Ill	13.82
100007	The Liquid Carbonic Corp., Chicago, Ill	1,146.75
100009	Singer Sewing Machine Co., New York, N. Y	30.63
100010	Allis-Chalmers Mfg. Co., West Allis, Wisconsin	428.63
100011	U. S. Tire Dealers Mutual Corp., New York, N. Y	23.07
100012	General Electric X-Ray Corp., Chicago, Ill	1,093.61
100014	Toledo Scale Co., Toledo, Ohio	No Tax
100015	Carbide & Carbon Chemicals Corp., New York, N. Y	87.73
100016	The Linde Air Products Co., New York, N. Y	176.11
100017	The Prest-O-Lite Co., Inc., New York, N. Y	72.98
100018	Burroughs Adding Machine Co., Detroit, Michigan	3,266.30

[fol.81]

100020	Skelly Oil Co., Kansas City, Missouri	No Tax
100022	International Bus. Machine Corp., New York, N. Y	545.21
100023	Ideal Equipment Co., Morristown, Minn	7.79
100024	Lowry-Miller Lumber Co., Princeton, Missouri	No Tax
100025	American-LaFrance & Foamite Industries, Inc., New York, N. Y	248.33
100026	Fruehauf Trailer Co., Detroit, Michigan	No Tax (Canc.)
100027	The Michigan Silo Co., Peoria, Ill	204.70
100028	J. D. Adams Co., Indianapolis, Ind	3,568.37

EXHIBIT "K"—Part 6—Continued

Reg. No.	Name and Address	Tax Paid
100029	Des Moines Nettleton Co., Inc., Syracuse, N. Y.	No Tax (Canc.)
100030	Penn Oil & Supply Co., St. Joseph, Missouri	153.02
100031	Griffin Wheel Co., Chicago, Illinois	737.52
100032	Marchant Calculating Co., Emeryville, Calif	20.00
100033	Monumental Sales & Mfg. Co., St. Cloud, Minn	1,264.99
100034	Portable Elevator Mfg. Co., Bloomington, Ill	No Tax
100035	Schmoller & Mueller Piano Co., Omaha, Nebr	No Tax
[fol.82]		
100037	E. I. Du Pont De Nemours & Co., Wilmington, Delaware	429.69
100038	Underwood Elliott & Fisher Co., New York, N. Y	701.51
100039	Cork Insulating Co., Chicago, Ill	No Tax
100040	J. & R. Motor Supply Co., Chicago, Ill.	No Tax (Canc.)
100041	Viscosity Oil Co., Chicago, Illinois	76.01
100042	Jewell Tea Co., Inc., Barrington, Ill	3,208.33
100043	Cook Paint & Varnish Co., Kansas City, Missouri	17.23
100044	Roy Bennett, Inc., Quincy, Ill	No Tax (Canc.)
100046	Decorators Wall Paper Co., Inc., St. Louis, Missouri	No Tax
100047	Sanitary Scale Co., Belvidere, Ill	33.35
100048	Ed. Friedrich Sales Corp., San Antonio, Texas	29.48
100050	General Tire & Rubber Co., Akron, Ohio	271.41
100051	Ditto, Inc,, Chicago, Ill	525.57
100052	Continental Car-Na-Var Corp., Brazil, Ind	76.69
100053	Lewistown Pipe Co., Ft. Wayne, Ind	No Tax
100054	The B. F. Goodrich Co., Akron, Ohio	132.37
100056	Complex Company, Chicago, Ill	No Tax
100057	Clarin Mfg. Co., Chicago, Ill	49.82
[fol.83]		
100058	Monroe Calculating Machine Co., Inc. Orange, N. J	107.73
100059	Ceco Steel Products Corp., Omaha, Neb.	641.19
100060	Standard Oil Co., Chicago, Ill	8,460.15
100061	Goodman Jewelers Inc., St. Paul, Minn.	No Tax
100062	Allied Laboratories, Inc., Kansas City, Mo	1,776.14
100064	Wheeling Corrugating Co., Wheeling, W. Va	No Tax
100065	W. G. Woodward Co., St. Louis, Mo	No Tax (Canc.)

EXHIBIT "K"—Part 6—Continued

Reg. No.	Name and Address	Tax Paid
100067	Royal Typewriter Co., Inc., New York, N. Y.	12.38
100068	Fairbanks, Morse & Co., Omaha, Neb.	428.78
100070	H. N. Greis, Trustee, Deep Rock Oil Corp., Chicago, Ill.	163.97
100071	Stors Supply Co., Omaha, Nebraska	110.48 (Canc.)
100072	Shell Petroleum Corp., St. Louis, Mo.	1,200.77
100073	The Creamery Package Mfg. Co., Chicago, Ill.	1,024.48
100074	General Electric Co., Schenectady, N. Y.	5.53
100075	The J. B. Ford Sales Co., Wyandotte, Michigan	75.99
100076	Crane Co., Davenport, Iowa	510.24
100084	Air Reduction Sales Co., New York, N. Y.	60.27
[fol.84]		
100085	Frigidaire Division, Gen. Motors Sales Corp., Des Moines, Ia.	127.77
100087	Armour & Company, Chicago, Ill.	92.59
100090	Blue Valley Creamery Co., Chicago, Ill.	No Tax
100091	The City Ice & Fuel Co., Chicago, Ill.	23.90
100093	Socony-Vacum Oil Co., Inc., St. Louis, Missouri	99.10
100094	U. S. Sanitary Specialties Corp., Chicago, Ill.	126.04
100096	The Louis Allis Co., Milwaukee, Wisconsin	No Tax
100129	Sherman's Associated Stores Co., Cleveland, Ohio	No Tax
100131	American Type Founders Sales Corp., Elizabeth, N. J.	No Tax
100132	Eastman Kodak Stores, Inc., Des Moines, Iowa	No Tax (Canc.)
100134	Jageman-Bode Co., Keokuk, Iowa	No Tax (Canc.)
100135	Hinde & Dauch Paper Co., Sandusky, Ohio	No Tax
100145	Certain - Teed Products Corp., New York, N. Y.	667.54
100146	Western Newspaper Union, Sioux City, Iowa	No Tax
100148	Dutch Mill Oil Co., Madison, Wisconsin	8.97 (Canc.)
100149	Oliver Farm Equipment Sales Co., Chicago, Ill.	11.14
[fol.85]		
100150	T. E. Ibberson Co., Minneapolis, Minn.	818.70
100158	Kennedy & Parsons Co., Omaha, Nebr.	No Tax
100159	Westinghouse Electric Supply Co., Chicago, Ill.	697.58
100163	Crane Co., Sioux City, Iowa	380.08
100164	Atlas Powder Co., Wilmington, Delaware	9.53

EXHIBIT "K"—Part 6—Continued

Reg. No.	Name and Address	Tax Paid
100165	The National Refining Co., Dubuque, Iowa	93.06
100166	The Austin-Western Road Machinery Co., Aurora, Ill	1,320.21
100167	General Electric Supply Corp., Bridgeport, Conn	No Tax
100170	Rock Island Fuel Co., Rock Island, Ill.	186.78
100171	The Todd Sales Co., Inc., Rochester, N. Y	146.52
100178	Durabilt Steel Locker Co., Aurora, Ill	94.25
100179	The National Cash Register Co., Dayton, Ohio	1,972.29
100194	Remington Rand Inc., Buffalo, N. Y	No Tax
100199	Line Material Co., South Milwaukee, Wis	127.68
100201	Wisconsin Great Lakes Coal & Dock Co., Milwaukee, Wis	56.78
100205	The Sprague Meter Co., Bridgeport, Conn	34.08
[fol.86]		
100213	James Mfg. Co., Fort Atkinson, Wisconsin	609.38
100215	Albert Pick Co., Inc., Chicago, Ill	589.95
100220	The Master Builders Co., Cleveland, Ohio	34.46
100225	Crane Co., Mason City, Iowa	298.72
100228	Central Oil & Grease Co., Rock Island, Ill	99.61
100235	Pure Carbonic, Inc., New York, N. Y	.32
100239	J. I. Case Co., Rock Island, Ill	23.55
100240	Honan-Crane, Inc., Lebanon, Ind	3.30
100241	Graybar Electric Co., Inc., New York, N. Y	3.65
100243	National Poster Exchanges, Inc., Omaha, Nebr	1.49
100249	Victor Adding Machine Co., Chicago, Illinois	No Tax
100250	National Carbide Corp., New York, N. Y	120.78
100252	James Stewart Corp., Chicago, Ill	No Tax (Canc.)
100263	Otis Elevator Co., St. Louis, Mo	89.84
100270	Standard Barber & Beauty Supply Inc., Omaha, Nebr	No Tax
100279	The Pure Oil Company, Chicago, Ill	No Tax
100281	Westinghouse X-Ray Company, Inc., Long Island City, N. Y	526.20
[fol.87]		
100282	Interstate Memorial Co., St. Cloud, Minnesota	8.61
100294	L. G. Balfour Co., Attleboro, Mass	52.86

EXHIBIT "K"—Part 6—Continued

Reg. No.	Name and Address	Tax Paid
100296	Woodstock Typewriter Co., Chicago, Ill.	235.64
100299	The Kelley-Koett Mfg. Co., Inc., Covington, Ky	169.82
100300	Ralston Purina Co., Davenport, Iowa	No Tax (Canc.)
100302	Hercules Powder Co., Wilmington, Delaware	48.42
100305	Gehl Bros. Mfg. Co., West Bend, Wisconsin	No Tax
100307	Ed. Friedrich Sales Corp., San Antonio, Texas	No Tax (Canc.)
100314	Geo. H. Weyer, Inc., Kansas City, Mo.	528.97
100315	Real Silk Hosiery Mills, Inc., Indianapolis, Ind	958.58
100316	Armstrong Cork Products Co., Lancaster, Pa	216.66
100317	Kremers-Urban Co., Milwaukee, Wis	No Tax
100318	Kinsley Laboratories, Kansas City, Mo.	.98
100319	Missouri Valley Serum Co., Kansas City, Kansas	.87
100320	The Fostoria Serum Co., Fostoria, Ohio	4.39
100321 [fol.88]	Norden Laboratories, Lincoln, Neb	207.60
100322	St. Joseph Veterinary Laboratories, St. Joseph, Mo	7.10
100323	Colorado Serum Co., Denver, Colorado	6.29
100326	Deep Rock Oil Corp. of Nebraska	17.23
100327	Oliver Farm Equipment Co., Chicago, Ill	No Tax
100331	Storz Supply Corp., Omaha, Nebraska	34.29
100332	Will Ross, Inc., Milwaukee, Wis	No Tax
100333	Merchants Chemical Company, Omaha, Nebr	No Tax
100334	B. A. Railton Co., Chicago, Ill	113.46
100335	Universal Atlas Cement Co., Chicago, Ill.	No Tax
100336	Westinghouse Electric & Mfg. Co., Pittsburgh, Pa	No Tax
100337	The Corn States Serum Co., Omaha, Nebr	84.23
100338	V. Mueller & Co., Chicago, Ill	113.85
100339	Sunshine State Poultry Lab., Sioux Falls, S. Dak	12.85
100340	Paul B. Elder Co., Bryan, Ohio	3.64
100341	Grain Belt Supply Co., Omaha, Nebraska	14.69
100342	Physicians & Hospitals Supply Co., Minneapolis, Minn	159.05
100343	Natkin & Company, Des Moines, Iowa	77.85
100345	Farmers Merchants Oil Co., Ellsworth, Minn	No Tax

EXHIBIT "K"—Part 6—Continued

Reg. No.	Name and Address	Tax Paid
[fol.89]		
100346	Jensen - Salsbery Laboratories, Inc., Kansas City, Mo.	150.10
100347	The S. E. Massengill Co., Kansas City, Mo.	190.22
100348	National Laboratories Corp., Kansas City, Kans.	1.36
100349	Corn Belt Serum Co., E. St. Louis, Ill.	.06
100353	R. J. Strasenburgh Co., Rochester, N. Y.	1.17
100354	The Warren-Teed Products Co., Columbus, Ohio	No Tax
100355	Sutliff & Case Co., Inc., Peoria, Ill.	374.30
100358	Armour & Co., Vet. Div., Kansas City, Kansas	No Tax (Canc.)
100359	Peoria Barber Supply Co., Peoria, Ill.	46.39
100360	A. W. Co., Inc., of Nebraska, Omaha, Nebr.	508.24
100365	National Theatre Supply Co., New York, N. Y.	152.60
100371	Liberty Laboratories, Inc., Omaha, Nebr.	4.08
100372	Miller-Hasselbalch Co., Omaha, Nebr.	No Tax
100374	Lederle Laboratories, Inc., New York, N. Y.	.95
100376	The Hobart Mfg. Co., Troy, Ohio	237.22
100379	Chemical Distributors, Inc., Chicago, Ill.	No Tax
[fol.90]		
100380	Hillyard Sales Co., St. Joseph, Mo.	No Tax
100385	Skelgas Co., Kansas City, Mo.	No Tax
100387	Nebraska Bridge Supply & Lumber Co., Omaha, Nebr.	No Tax
100389	Peerless Serum Co., Kansas City, Kansas	No Tax
100392	The Long Bell Lumber Co., Kansas City, Missouri	No Tax
100399	Universal Laboratories, St. Louis, Missouri	No Tax
Total amount of tax paid		$48,436.59
Total number of retailers		169

Part 7

Out of State Firms (not Corporations) Registered for Collection of Tax Under Sections of Personal Property Use Tax Law

Reg. No.	Name and Address	Tax Paid
100275	John J. Kroner, Chicago, Ill.	$ 11.98
100357	Guilfoil Serum Co., Kansas City, Kans.	13.66
100363	Dr. Paul Jucknies, Omaha, Nebr.	No Tax
100390	Nelson Laboratories, Sioux Falls, S. Dak.	No Tax
100391	Morton Products Co., Morton, Ill.	No Tax
Total amount of tax paid		$ 25.64
Total amount of retailers		5

EXHIBIT "K"—Part 7—Continued

[fol. 91] Recapitulation

	No. of Accounts	Tax Paid
Part 1	63	$ 2,048.98
Part 2	14	867.14
Part 3	10	210.90
Part 4	2	9,397.77
Part 5	136	2,880.15
Part 6	169	48,486.50
Part 7	5	25.64
Non-Registered Retailers Returns		100.81
Total	399	$63,967.98

Defendant's Exhibit.

EXHIBIT "C-1"

To Our Iowa Customers:

We believe that certain of the provisions of the Iowa Use Tax law as applied to our business, are unconstitutional. Therefore we are not collecting or reporting the Use Tax on mail orders sent by Iowa customers direct to any of our mail order houses.

Until you hear from us to the contrary, mail in your orders just as you have in the past.

Montgomery Ward & Co.

On December 21, 1938, the Court rendered the following

OPINION OF THE COURT

The record shows that the plaintiff is a foreign corporation organized under the laws of the State of Illinois, duly [fol. 92] licensed, under the general statutes regulating such matter, to do business in the State of Iowa, and that such license to do business in the State of Iowa was granted a considerable period of time prior to the enactment of what is commonly known as the Use Tax Act by the legislature of the State of Iowa.

That following the licensing of the plaintiff to do business in the State of Iowa, and up to the commencement of this action, the plaintiff had made large investments in the State of Iowa in connection with the establishment and op-

eration of some twenty-seven retail stores. That the plaintiff has complied with the statutes of the state relative to the assessment of its property located within the state and the payment of taxes thereon, the collection and accounting for the so-called sales tax under the laws of the State of Iowa, on merchandise sold by it in its various stores in Iowa, and the so-called use tax, save and except in the particular as hereinafter mentioned. That the plaintiff operates a very extensive business in the various states of the United States, and in its business organization or setup, it maintains at certain designated localities units of its business which are confined exclusively to what is known as the mail order business. That it has one such unit located in the City of Chicago, Illinois, one in Kansas City, Missouri, and one in St. Paul, Minnesota, together with certain other units of like kind located elsewhere in the United States but which are not involved in this case before the court.

That periodically during the year plaintiff causes to be printed and issues what may be termed a general catalogue, which it disseminates to prospective purchasers or customers throughout the territory served by these mail order units of its business, and that such catalogues or publications are circulated throughout the State of Iowa. That [fol. 93] customers of the plaintiff in ordering from such catalogues use a form supplied by the plaintiff in which the purchaser designates the specific property which the customer is purchasing, by proper reference to the designation of such article in the catalogue; the purchaser encloses with such order the amount to cover the purchase price, together with the cost of transportation from the mail order unit to which the order is addressed, to the point designated in Iowa by the customer. By specific terms embraced in the order blank, the plaintiff reserves the right of acceptance of the order at the point of reception, that is, either in Chicago, Kansas City, or St. Paul, according to the unit to which the customer may mail his order, and the delivery of the goods to the purchaser is designated to be as and of the point of the location of the mail order unit so receiving said order from said customer. That is, if the order is received at Chicago, Illinois, the point of delivery to the customer is specifically provided to be in Chicago, Illinois, and likewise with respect to the other units at St.

Paul and Kansas City, if the order is transmitted from the customer to such unit through the mail or otherwise.

On orders of this character so received at these mail order units in these several locations, the plaintiff, although demand has been made upon it by the defendants in this action who compose the Iowa State Board of Assessment and Review and who are designated by the so-called use tax act as the body having the enforcement of said use tax law under its authority and control, has refused to collect from the mail order purchaser the said so-called use tax upon the items covered in any of the purchases so made in the manner as indicated herein.

That prior to the commencement of this action, and on or about the 28th day of February, 1938, the defendants [fol. 94] caused to be served upon the plaintiff a notice and order advising the plaintiff that unless it complied with the demands of the defendants to collect upon such mail order items the use tax, and remit the same to the State of Iowa through said Board of Assessment and Review, that the said Board would proceed with the necessary steps under the statutes of Iowa to cause a revocation of the right of the plaintiff to transact business in the State of Iowa and to oust from the State of Iowa the said retail establishments of the plaintiff so theretofore established under the general authority granted to it to transact business in the State of Iowa prior to the adoption of the said use tax law, and that following the serving of said notice and order upon the plaintiff this action was commenced to restrain the defendants from carrying out their threatened action looking toward the cancellation of the right of the plaintiff to transact business in the State of Iowa through the medium of the said retail stores, and to oust them from the transaction of business within the state.

By appropriate allegations in plaintiff's petition, the contemplated action of the defendants with respect to the cancellation of the right of the plaintiff to transact business in Iowa is attacked on numerous constitutional grounds involving alleged violation of constitutional provisions of the Constitution of the United States and also constitutional provisions of the Constitution of the State of Iowa, which it is claimed protects the plaintiff in the situation, and which would be violated if the threatened action of the defendants was carried out to its proposed culmination.

For the purposes of a disposal and a decision of the rights of the parties in this case, the court feels that only certain of these various questions so raised by the plaintiff are necessary to be determined for a solution in this case, and the court will proceed in the subsequent portions [fol. 95] of this opinion to pass upon and decide the rights of the parties in this case, bottomed upon the questions touched upon in this opinion, and those only, as, in the judgment of the court, the final conclusion as arrived at in this opinion disposes of the rights of the parties and is a complete adjudication of the merits of this case.

The plaintiff contends that under the fact situation as it is disclosed by the record in this case, the so-called use tax act, interpreted and applied as is attempted to be done by the defendants in connection with the plaintiff's business, violates Section 8 of Article I of the United States Constitution, the same being what is commonly known and understood to be the interstate commerce clause of the Constitution of the United States, and in this connection the plaintiff points out that under the use tax act it is provided as follows:

Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state, not exempted under the provisions of Section Three hereof nor collectible under the provisions of Section Six hereof, shall at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the board, if the board shall, by regulation, require such receipt. Each such retailer shall list with the board the name and address of all his agents operating in this state, and the location of any and all his distribution or sales houses or officers or other places of business in this state.

And it is claimed by the plaintiff that this provision of the law which attempts to force the plaintiff to collect the use [fol. 96] tax on these mail order items is an invasion of the powers of Congress under Section 8, Article I of the Constitution of the United States, for that, the effect of the act is to regulate interstate commerce between the states of Illinois, Missouri and Minnesota, and the State of Iowa, as the

case may be in the particular facts surrounding the particular mail order item involved, and that the effect of it is to place an undue burden upon the plaintiff in respect to an interstate commerce item, which the State of Iowa is denied the right to legislate in respect to by said Section 8 of Article I of the Constitution of the United States, all power in respect thereto being reserved to the Congress of the United States.

In the oral argument in the submission of this case to this court, the attorney for the State of Iowa substantially admitted that the contentions of the plaintiff would be true if the so-called use tax act was to be literally construed in strict accord with the language of the act as herein quoted, but claimed that it was incumbent upon this court to construe the said use tax act so as to harmonize the same with the Constitution of the United States in the particular complained of, if the act was susceptible of such construction, and that it was so susceptible to such construction, by construing the act so as not to require the plaintiff to collect the use tax at the time of making such sales in Illinois or Missouri or Minnesota, as the case may be, but contended that it became the duty of the plaintiff-seller to follow the items sold into the State of Iowa and collect the use tax when the interstate commerce feature had ceased to exist by reason of the article coming to rest within the State of Iowa, and that so construed the act would not be violative of the commerce clause of the Federal Constitution.

[fol. 97] The answer to the contentions of the State is,

First. That such interpretation is contrary to the express language of the act, for that it is provided that the seller

shall at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser,

and nowhere in the act is there any other provision for the manner or time of collection, which applies to the plaintiff under the facts in this case. The State contends that the word "shall" should be construed as "may", for that in numerous decisions of our Supreme Court in construing statutes the word "shall" has been construed "may". But, wherever that has occurred, the use of the word "may" in place of the word "shall" does not do violence to the express

language of the act, as is apparently true in the situation as it confronts the court in connection with the act under consideration. In other words, if we are to use the interpretation as suggested by counsel for the State, we would have this law read that the seller

may at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser, etc.,

and in order to give proper effect to the word "may" as used in the act, under such an interpretation, the court would have to give force and effect to the word "may" as if it read "shall", for otherwise there would be no duty created by the statute upon the seller to collect the tax. If the word "may" is to be used literally, it is merely permissive and not mandatory.

Second. A construction and application similar to what is contended for by the State, would result in not only [fol. 98] leaving the act open to an attack as violative of Section 8 of Article I of the Constitution of the United States, but would leave it susceptible to the attack because of its violation of Section 1 of the 14th Amendment to the Constitution of the United States, as asserted by plaintiff herein. The effect of the construction as contended for by the State would result in a denial to the plaintiff of the right to contract, for instance, in the State of Illinois, with a prospective purchaser from Iowa, in such a way as to bring about a situation whereby the contract would be exclusively an Illinois contract, as actually exists in connection with the transactions as the record shows with respect to each of these mail order items, and to say to the plaintiff,—

"If you sell to some purchaser living in Iowa, although the transaction may have its inception and its consummation in the State of Illinois, still you are required by the laws of Iowa to retain dominion and jurisdiction over the item involved in the transaction and to follow the same into the State of Iowa in an interstate shipment where the seller is an involuntary shipper, and to collect the tax when the interstate feature has ceased to exist and the article has come to rest in the State of Iowa."

A denial of the right to so contract clearly infringes upon the provisions of Section 1 of the 14th Amendment

to the Constitution of the United States, for it is an abridgment of the right that the plaintiff is entitled to exercise in the foreign jurisdiction, so far as the State of Iowa is concerned, of entering into contractual relations whereby the plaintiff sells and a resident of this state buys, with the specific conditions in the contract that the delivery shall be at the point of purchase in the foreign jurisdiction and not at a point in the State of Iowa. To deny a citizen of [fol. 99] another state the right to so contract with a citizen of this state, certainly is to abridge the privilege and immunities of citizens of the United States and to deny the plaintiff the protection of the said 14th Amendment in that particular. It also would have the effect of denying the equal protection of the laws, as prohibited by the said Section 1 of the 14th Amendment of the Constitution of the United States, for the record shows that there are competitors of the plaintiff in these various localities where plaintiff has these mail order units, who have no places of business in Iowa and who are not affected by the use tax law.

As heretofore suggested, such a construction would also violate the interstate commerce clause of the Constitution of the United States, being Section 8 of Article I, in that it would deny to the plaintiff the right of delivery of the purchase in the foreign state as contemplated by the contract entered into between the seller and the purchaser, as shown by the record in this case, and make it obligatory upon the plaintiff to retain dominion over the article of sale until it had reached its destination in Iowa, and thereby compel the plaintiff to become an involuntary shipper in an interstate shipment. If anything of that character is possible under the law, it must be through an act of Congress and not through the act of a legislature of a given state, because the effect of it is to make the plaintiff engage in interstate commerce with respect to that shipment against the will and judgment of the plaintiff and against its desires, simply because it indulges in the privilege and right which it has as a citizen of the United States to engage in a contractual relation with a citizen of the State of Iowa outside the State of Iowa and in a foreign jurisdiction, and although such contract may be in strict conformity to the requirements of the statutes of the state where the contract is made and in conformity to the requirements of the Constitution [fol. 100] and the acts of congress with respect to the United States. And, in addition to what has already been sug-

gested, no such result can be accomplished except by and through an extraterritorial effect to the local statutes of Iowa, and to sustain which there has been no authorities submitted to this court by counsel for the State.

The State does contend that this case comes within the pronouncements of the United States Supreme Court in the cases of Wiloil Corporation v. Pennsylvania, 294 U. S. 169; Henneford, et al., v. Silas Mason Company, Inc., et al., 300 U. S. 577; State of Minnesota v. George Blasius, 290 U. S. 1; Monamotor Oil Company v. Johnson, 292 U. S. 86, and Felt & Tarrant Mfg. Co. v. Corbett, reported in 23 Federal Supplement on page 186, but the court is of the opinion that an analysis of these cases will clearly establish that they are readily distinguishable from the situation that exists in the case at bar. In all of these cases the language of the opinion clearly shows that either the owner of the property involved and upon which the tax was sought to be collected, brought the property into the state and the state authorities were proceeding against such owner to collect the tax, or where the state authorities were proceeding to subject the seller to the payment of the tax, such seller was the shipper of the articles into the state and the articles had come to rest in the various states, and the tax was held to apply after the articles had ceased to be in interstate commerce and had come to rest in the state involved and was still within the dominion and control of the seller at the time of the attaching of the tax feature.

The State of Minnesota v. Blasius, supra, is a case where the property was in the possession and control of the owner in the State of Minnesota and the owner contended that it was still in process of interstate commerce, for that it had only come to rest in Minnesota temporarily, the property [fol. 101] being cattle, but in the case, Mr. Chief Justice Hughes writing the opinion, points out,

that Blasius did not buy the cattle for the purpose of export or shipment to another state; and that after their purchase by him, and until he resold, the cattle were "at absolute and complete rest in the yards at South St. Paul" and "were a part of the general mass of cattle in the state and locally owned."

The quoted language here was quoted by Mr. Justice Hughes from the opinion of the trial court and was adopted by the Supreme Court as the fact.

Henneford v. Silas Mason Company, supra, was another case where the property was in the possession and control of the owner in the State of Washington, and the owner, the plaintiff in the action, being a contractor on the Grand Coulee Dam on the Columbia River, shipped the articles of machinery into the state and they came to rest in the state and had been used for months in the work of the contractor, and again the court held that because they had come to rest in the state, under the control and possession and dominion of the owner, they were amenable to the tax in controversy.

In the Felt & Tarrant Mfg. Co. v. Corbett case, supra, it appears from the language of the opinion as follows:

The plaintiff is an Illinois corporation and it sold comptometers in the State of California by and through the medium of two local agents residing in California; that these agents in selling the articles did so by and through the medium of written contracts which provided that it did not become a contract with the plaintiff until it had been accepted by them at their place of business in Illinois, but the contract contained this provision,

[fol. 102] All orders taken must be submitted to and approved by plaintiff, all sales and deliveries must be made by, and all bills for such orders as are accepted must be rendered by, the plaintiff.

It further appears from the language of the opinion, as follows:

All machines sold for delivery in California are shipped from one of plaintiff's distributing points outside of the state. Sometimes machines are forwarded directly to the purchasers, while in other instances, in order to secure reduced freight charges, large groups of machines are shipped to the general agent who makes delivery to the respective purchasers.

When we consider that under the terms of the written contract all deliveries were required to be made by the plaintiff, and then the further observation of the court is taken into consideration, that in order to reduce freight charges the plaintiff-seller shipped large quantities of machines at one time, it is clearly apparent that in this cited case the shipment of the machines into the State of California was by the plaintiff, and they continued their dominion and con-

trol over the machines until the delivery in California, at which time, under the decisions of the Supreme Court of the United States, the articles had ceased to be in interstate commerce and had come to rest in the State of California.

Defendants in the instant case lay great stress upon the decision of the United States Supreme Court in the case of the Monamotor Oil Company v. Johnson, supra. That case had its origin in the State of Iowa, and it is claimed by the defendants in the instant case to be decisive of the question that we have under consideration here.

[fol. 103] With this conclusion this court cannot agree. It appears from the opinion in the cited case that the appellant was an Arizona corporation engaged in the business of buying, manufacturing, blending and selling gasoline and kindred products, including the importation into Iowa of gasoline by tank cars, and that in some instances the plaintiff shipped direct to dealers in Iowa, customers of the appellant, and it was claimed by the plaintiff that because of these direct shipments, the burden on interstate commerce was obvious. In disposing of the case the Supreme Court of the United States, Mr. Justice Roberts delivering the opinion, says, in connection with this contention of the plaintiff:

The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant.

Now, when we take the language as quoted from this cited case and consider it in the light of the law defining who was a distributor of motor fuel oil within the meaning of the statute, it is plain that this decision in the cited case was predicated upon the fact that the Monamotor Oil Company actually was the shipper of the oil, under all circumstances, into Iowa, and continued to have dominion and control over it until a delivery to the dealer in Iowa, because the law defining who is a distributor is as follows:

any person who brings into the state or who produces, refines, manufactures or compounds within the state any

[fol. 104] motor vehicle fuel to be used within the state or sold or otherwise disposed of by him within the state for use in the state.

So that in order to be a distributor one must either bring the oil into the state or produce it or refine it or manufacture it, or compound it, within the state, for use within the state. So that it is apparent that in the consideration and determination of this cited case, the United States Supreme Court understood, and the records show, that on these shipments direct to dealers in Iowa, the Monamotor Oil Company was the shipper and continued in dominion and control of the products so shipped until they came to rest in Iowa and were delivered to the dealers. Under such circumstances, of course, under the decisions of the United States Supreme Court, as herein cited, the oil having come to rest before delivery to the dealer, the distributor was liable in the first instance for the tax.

This distinction which is pointed out in connection with all of these cases upon which the State relies, is clearly set forth in the opinion of the Supreme Court of the United States in the case of Wiloil Corporation v. Pennsylvania, supra. The opinion in that case was written by Mr. Justice Butler, and in order to have the fact situation clearly before us it is advisable to set out the statement of the facts as found by the court:

Appellant, a Pennsylvania corporation having its principal place of business in Pittsburgh, sells liquid fuels at wholesale and is a distributor as defined by the act. The tax in controversy was laid at three cents per gallon upon the contents of 13 tank cars sold and delivered by it. All were ordered through its agent in Philadelphia for delivery [fol. 105] to purchasers at that city or at Essington, Pennsylvania. The orders specified a price per gallon "f. o. b. Wilmington, Del., plus 3c tax," and were subject to, and received, appellant's approval at its office in Pittsburgh. The purchasers were not licensed or taxable as distributors. All fuels delivered under these contracts were obtained from Crane Hook Company of Wilmington, Delaware, and on the order of appellant were shipped by rail from there to the purchasers in Philadelphia or Essington. Each car moved on a bill of lading in which the appellant was consignor and the purchaser was consignee; the place of shipment indicated was Wilmington and the place of destination was

consignee's private siding in Philadelphia or Essington. Appellant prepared and sent to the buyer an invoice covering each shipment showing the price as stated in the order.

The inference that might be drawn from the f. o. b. order, the billing and straight bill of lading that the parties intended delivery to purchaser at place of shipment is negatived by other circumstances. The contracts were executory and related to unascertained goods. It does not appear that when they were made appellant had any fuels of the kinds covered or that those to be delivered were then in existence. There was no selection of goods by purchasers. Appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania. It is the practice in appellant's business to sell f. o. b. at a specified place in order to fix the price and such billing may be merely price fixing and not an indication of the source or place of shipment. The reference to the tax in the orders and invoices would have been unnecessary if delivery were [fol. 106] not to be made in Pennsylvania for if made at Wilmington, the transactions would not have been within the provision of the taxing act.

The great particularity with which Mr. Justice Butler points out the retaining of the control and dominion over the shipment by the Wiloil Corporation in this cited case, will be noted, and his plainly pointing out that the tax reference in the orders would have been unnecessary,

if delivery were not to be made in Pennsylvania for if made at Wilmington, the transactions would not have been within the provision of the taxing act.

clearly shows that this matter of dominion and control over shipments of this character is the paramount and outstanding consideration in determining whether or not the seller of an article is to be held liable in the first instance for a tax of the character we have under consideration in the instant case, and all of the cases upon which counsel for the State of Iowa in the case at bar relies as sustaining his contention of the right of the State to insist upon the collection of the tax in this case under consideration, by the seller, are clearly distinguishable from the fact setup that we have to deal with in the instant case.

As indicated by the reasoning of the court in the instant

case and in this opinion, this court is of the opinion, and so holds, that the attempt by the State of Iowa, through the medium of the defendants, the Board of Assessment and Review of the state, to interpret and apply the statute so as to make it obligatory upon the plaintiff to collect the use tax on these items of exclusive mail order transactions wherein the fact situation is as already outlined herein, is clearly violative of the constitutional rights of the plaintiff in regard to invading the rights of the plaintiff under Sec-
[fol. 107] tion 1 of the 14th Amendment to the Constitution of the United States, and in regard to Section 8 of Article I, of said Constitution.

The defendants further contend that even though the court finds as it has already found and expressed herein, that the statute as interpreted and applied by the defendants is violative of the constitutional rights of the plaintiff under the Federal Constitution, that still it is within the legal right of the State to predicate an order cancelling the permit of the plaintiff to transact business in the State of Iowa, upon its refusal to comply with the notice and order as served upon it by the defendants to proceed to collect and report to the defendants for the use tax upon these items of mail order business, and in support of their claims in this regard this court is cited to several cases, one of the outstanding ones being Security Mutual Life Insurance Company v. Prewitt, 202 U. S. 246. Counsel for the State in oral argument laid emphasis upon this case and several others of a like tenor, but possibly in none of the cases cited is the language quite as positive and extreme as is the language of Justice Peckham in the cited case referred to, and if the cited case was still the law there would be much of merit in the contention of the State on this proposition, but fortunately the United States Supreme Court in the case of Terral v. Burke Construction Co., 257 U. S. 529, has clarified a doubtful situation which had existed over a period of years in connection with this question now under consideration.

It appears from a reading of the opinion that the Burke Construction Company was a corporation organized under the laws of the State of Missouri; that it had been licensed to do business in the State of Arkansas; that it was organized for the purpose of doing construction work and was actually so engaged in Arkansas; that the right to do busi-
[fol. 108] ness in the state was a valuable privilege, and the

revocation of the license would greatly injure it. That it had brought an original suit in the federal court of Arkansas and had removed a suit brought against it to the same federal court; that the Secretary of State was about to revoke the license because of said suit and such removal, acting under the requirement of Section 1 of the Act of the Legislature of Arkansas of May 13, 1907, reading as follows:

If any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the Secretary of State to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in this State; and if such corporation shall thereafter continue to do business in this State, it shall be subject to the penalty of this Act for each day it shall continue to do business in this State after such revocation.

The penalty was fixed at not less than $1,000.00 a day. The plaintiff construction company averred that the Act was in contravention of Section 2, Article III, being the judiciary article of the Federal Constitution, and of Section 1 of the 14th Amendment. The defendant filed an answer in the case containing some denials, but there was no denial that the plaintiff was a foreign corporation or that it had been duly granted a license to do business in the State of Arkansas, or that its right to do such business in Arkansas was a valuable right, or that it had commenced an action in federal [fol. 109] court and removed another one, or that the defendant intended to cancel the plaintiff's license because of the removal of the case to the federal court and the commencement of the other one therein. Such matters not being denied were accepted as admitted, and then Chief Justice Taft says:

The sole question presented on the record is whether a state law is unconstitutional which revokes a license to a foreign corporation to do business within the State because, while doing only a domestic business in the State, it resorts to the federal court sitting in the State.

The cases in this court in which the conflict between the

power of a State to exclude a foreign corporation from doing business within its borders, and the federal constitutional right of such foreign corporation to resort to the federal courts has been considered, can not be reconciled. They began with—

And then Chief Justice Taft cites a number of cases involving the question, including Barron v. Burnside, 121 U. S. 186, which went up to the Supreme Court of the United States from the State of Iowa, and in which the Supreme Court had held a statute of the same character as was under consideration in the Terral case from Arkansas, to be unconstitutional, and also this case already referred to, Security Mutual Life Insurance Co. v. Prewitt, 202 U. S. 246, and then he says:

The principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of [fol. 110] its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law. It follows that the cases of Doyle v. Continental Insurance Co., 94 U. S. 535, and Security Mutual Life Insurance Co. v. Prewitt, 202 U. S. 246, must be considered as overruled and that the views of the minority judges in those cases have become the law of this court. The appellant in proposing to comply with the statute in question and revoke the license was about to violate the constitutional right of the appellee. In enjoining him the District Court was right, and its decree is Affirmed.

This pronouncement of the Supreme Court through the opinion of the late Mr. Chief Justice Taft, is still the law

of this country so far as this court has been able to ascertain from an examination of the authorities, and it has been applied on a number of occasions since its pronouncement, one such application being by the late Mr. Justice Holmes in the case of Fidelity & Deposit Co. v. Tafoya, [fol. 111] 270 U. S. 426, wherein Mr. Justice Holmes uses the following language:

Coming then to the merits, we assume in favor of the defendants that the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result.

And further on in the opinion Mr. Justice Holmes refers specifically to the Terral v. Burke Construction Co., case, supra, citing it with approval. How apt in its application to the case at bar is this quotation from this opinion in the cited case under consideration:

One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result.

In the case at bar the State of Iowa, through the instrumentality of the defendants, is seeking to oust the plaintiff company from the right to do business in the State of Iowa because it refuses to perform an act demanded of it which is violative of its constitutional rights under the provisions of the Federal Constitution as already herein discussed, and saying to the plaintiff,—"Unless you do comply with our illegal demand you will have to get out of the State of Iowa with your retail stores." If that can be accomplished through the medium of legislative enactment of a state and thereby nullify the constitutional inhibitions of the Federal Constitution, there is nothing left of the Federal Constitu- [fol. 112] tion*al* which would make it rise to the dignity of the fundamental law of this country, which it is and which it has been recognized to be for all the years since it has been adopted.

So that the court is satisfied that there is no merit in the

contention of the State that is can predicate an order of removal against the plaintiff company and compel it to remove from the State of Iowa with its retail stores because of the failure of the plaintiff to acquiesce in the demands of the state through the medium of the defendant Board, in regard to the collection of and accounting to the State for the use tax on these items involved in the exclusive mail order business of the plaintiff, as described in this opinion.

What has been said in regard to the inability of the State to predicate an order of removal against the plaintiff because of the invalid demand in regard to the tax on these mail order items applies with equal force to the suggestion of the State that because the State of Iowa has reserved by Section 8376 of the Code of 1935, the right and power to legislate as to corporations and to enact laws different from those obtaining at the time of the organization of the corporation, that is has the right to enact mandatory laws of the character involved in this action and to expel a foreign corporation who refuses to comply. The particular section referred to is as follows:

The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of either title 19, 20, 21, or 22 or whose organization may be adopted or amended thereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used, or enjoyed by such corporation may be regu- [fol. 113] lated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good.

It must be apparent that this reserved power can only be exercised by and through the medium of legal legislative enactment. Unless the act has been legally enacted and is legal in its effect on the thing legislated with reference to, it is not a law, and never rises to the dignity of a law, and therefore can be of no effect. And it would be astounding if the pronouncement of the legislature as to what was for the public good would be sustained, notwithstanding the fact that the particular act was found to be violative of the inhibitions of the Constitution of the United States. That is clearly contradictory in its terms. An act that would violate the Constitution of the United States necessarily could never be for the public good.

The same is true of the suggestion by counsel for the State, that in the issuance of the permit to the plaintiff company, there was incorporated the reserved power to proceed with subsequent legislative control similar to what is covered by the section of the Code above quoted. As has been seen in Terral v. Burke Construction Co., supra, even if the plaintiff company in this case before the court, had signed an express waiver and entered the state with that situation and proceeded to transact business, the waiver is held a nullity, and it may resort to the federal courts or to any court in this country for protection against the invasion of its constitutional rights, and it is without liability to be removed from the state on peremptory order because of its invoking the aid of the court to so protect it.

The court has sufficiently outlined herein by its reasoning, that in this case the plaintiff is entitled to the issuance [fol. 114] of an injunction permanently enjoining the defendants from doing or performing any or each of the things specified in plaintiff's prayer, insofar as any such act or thing may be predicated upon the failure of the plaintiff to comply with the demands of the defendant Board in connection with the collection of the use tax on items of merchandise sold by and through the medium of the exclusive mail order business of the plaintiff, and in the manner as herein outlined, as the same may occur in any of its exclusive mail order depots or houses located outside of the State of Iowa.

Counsel for plaintiff is directed to prepare a decree in conformity to this opinion, submit the draft of the same to counsel for the State for approval as to form, noting an exception to the State of the defendants on all adverse rulings, and when so approved as to form, submit the same to this court for signing and entering of record in the case.

(Signed) John J. Halloran, Judge.

JUDGMENT AND DECREE

This cause having heretofore come on for hearing on the 13th day of October, 1938, the plaintiff appearing by its attorneys, Stuart S. Ball, Robert L. Wright and Parrish, Guthrie, Colflesh & O'Brien, and the defendants appearing by their attorneys, John H. Mitchell, Attorney-General for the State of Iowa, Charles Bookin, Special Attorney General for the State of Iowa, and Charles W. Wilson, Assist-

ant Attorney General for the State of Iowa. The court having heard the evidence and arguments of counsel and having taken the same under advisement, and on the 21st day of December, 1938, filed an opinion of the court, finds [fol. 115] that on the facts and laws and for the reasons as stated in said opinion, the merits of said cause are with the plaintiff, and the plaintiff is entitled to the relief prayed for in its petition.

Now, Therefore, in conformity with said opinion,

It Is Hereby Ordered, Adjudged and Decreed:

(1) That the temporary injunction heretofore granted to the plaintiff in this cause shall be made permanent.

(2) That the defendants and each of them, and their successors in office, are permanently enjoined and restrained from doing any and each of the following acts, to-wit:

(a) Making any finding of fact that this plaintiff has failed to comply with the requirements of the order of the Board dated February 26, 1938;

(b) Making any finding that plaintiff has failed to comply with the provisions of the Iowa Use Tax Laws;

(c) Revoking or cancelling any sales permit issued to plaintiff covering the operation of its retail establishments in the State of Iowa;

(d) Sending any copy of any order of the said Board with respect to plaintiff's failure to comply with the Iowa Use Tax Law to the Secretary of State of the State of Iowa;

(e) Making any request upon the Secretary of State of the State of Iowa for the revocation of the permit of this plaintiff to do business within the State of Iowa;

(f) From taking any action or issuing any order under or in accordance with the resolution and order of the re- [fol. 116] spondent, Exhibit "A" attached to plaintiff's petition, and dated February 26, 1938;

(g) From taking any action that will in any way disturb the position of this plaintiff with respect to its business in the State of Iowa as a result of any failure on the part of plaintiff to comply with any provisions of the Iowa Use Tax Law;

insofar as such acts may be predicated upon the failure of plaintiff heretofore or hereafter to comply with the

demands of the defendants, or their successors in office, for the collection by the plaintiff, and/or the payment or remittance by the plaintiff of the "Use Tax" on items of merchandise sold by and through the medium of the exclusive mail order business of the plaintiff.

(3) Judgment is hereby rendered in favor of the plaintiff and against the defendants, and each of them, for the costs of this action as taxed by the Clerk.

(4) The injunction bond filed by plaintiff in connection with the issuance of the temporary injunction is hereby released and the surety exonerated.

The defendants duly except to all adverse ruling and to this decree.

Dated this — day of December, 1938.

—— ——, Judge.

Thereafter the defendants perfected an appeal from the foregoing judgment and decree by serving on the plaintiff's attorneys on the 28th day of March, 1939, and by filing in the office of the Clerk of the District Court of Polk County, Iowa, on the 29th day of March, 1939, with acceptances of service endorsed thereon a

[fol. 117] NOTICE OF APPEAL

To: Montgomery Ward & Co., Incorporated, plaintiff and to Parrish, Guthrie, Colflesh & O'Brien, Robert L. Wright and Stuart S. Ball, their Attorneys:

You and each of you are hereby notified that the defendants herein have appealed to the Supreme Court of Iowa, from the final judgment in this cause and from the final order or decree herein and from each and every ruling adverse to the defendants during the progress and hearing of the said case and that said appeal will come on for hearing at the May, 1939 term of the Supreme Court of Iowa or as soon thereafter as the same can be heard in its regular order in said court.

Dated at Des Moines, Iowa, this 27th day of March, 1939.

CERTIFICATE RE STATEMENT OF EVIDENCE

On the 14th day of October, A. D., 1938, there was filed in the office of the Clerk of the District Court of Polk County, Iowa, the official shorthand notes taken by the re-

porter in said case, containing all of the evidence offered, introduced, heard, read or received in the trial of said cause, and all objections thereto, and all rulings of the court thereon, and exceptions taken to said rulings, together with exhibits offered and introduced on the trial and made a part of the record therein, said shorthand notes, together with the exhibits and documentary evidence, being certified to by Honorable John J. Hallaran, Judge, and Vernon L. Grant and W. Scott Reiniger, official shorthand reporters.

On the 30th day of June, A. D., 1939, there was also filed in the office of the Clerk of the District Court of Polk County, Iowa, a transcript and translation of said short-
[fol. 118-120] hand notes, certified to by the shorthand re-reporters transcribing said notes as an accurate transcription of the shorthand notes of the evidence taken in the trial of said cause by the shorthand reporters.

CERTIFICATE OF ATTORNEYS

We hereby certify that the foregoing Abstract is a full and complete abstract of the record in the foregoing cause, including abstract of all pleadings filed in said cause, together with the rulings of said court with the objections and exceptions thereto in so far as the same are material to this appeal.

Fred D. Everett, Attorney General, John E. Mulroney, Assistant Attorney General, Attorneys for Appellants.

NOTICE OF ORAL ARGUMENT

Notice is hereby given that upon the submission of this cause, the appellants will appear and argue the same orally.

Fred D. Everett, Attorney General, John E. Mulroney, Assistant Attorney General, Attorneys for Appellants.

CERTIFICATE OF COST

We hereby certify that the cost of printing the foregoing Appellants' Abstract of Record is in the sum of $102.75.

Fred D. Everett, Attorney General, John E. Mulroney, Assistant Attorney General, Attorneys for Appellants.

[fol. 121-122] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 123] In Supreme Court of Iowa, September Term, 1939

Equity. 9-44963

Montgomery Ward & Co., Incorporated, Appellee,

vs.

Louis E. Roddewig, D. L. Murrow, and C. F. Green, Individually and as Members of the Iowa State Board of Assessment and Review, Appellants

Appeal from District Court of Polk County, Iowa, Honorable John J. Halloran, Judge

Appellee's Denial of and Amendment to Appellants' Abstract of the Record and Notice of Oral Argument—Filed August 10, 1939

[fol. 124] The appellee, Montgomery Ward & Co., Incorporated, denies that Appellants' Abstract of the Record, filed herein, is a full, true and complete Abstract of the Record, and states that the same is incorrect and incomplete and does not fairly and correctly show the record as made, and appellee therefore amends said Abstract of the Record by adding thereto or striking therefrom, as follows, to-wit:

Plaintiff's Evidence

G. W. Vaught, called and sworn, testified on behalf of the plaintiff, as follows:

Direct examination:

On page 34, strike the period in line 27 and substitute a comma therefor, and add after the comma the following:

"such as billing, sales abstracts, entry index and other similar offices." (Tr. p. 4.)

On page 34, after the word "controller," appearing in line 27, add the following:

"that is, controller of stocks, from both the dollar standpoint and that of items and units. It had to do with the units of merchandise handled or the dollar value of them." (Trans. p. 4.)

On page 34, after the period in line 30, add the following:

"The bargain book is the small catalog issued about six times per year, averaging from 32 to 100 pages, primarily for the disposal of surplus or discontinued stock." (Trans. p. 5.)

[fol. 125] On page 34, after the period in line 34, add the following:

"As treasurer, there are under my general supervision, the finance and credit offices, the accounting and statistical and auditing department, the secretary's office which has to do with the law, insurance, taxes and stock transfers." (Trans. p. 5.)

On page 35, between the words "show" and "the", in line 1, insert the following:

"the amounts owed to the company by customers and" (Trans. pp. 5-6).

On page 35, after the second comma, appearing in line 13, add the following:

"the next classification is" (Trans. p. 7).

On page 55, after the word "and," in line 15, add the following:

"the third classification is" (Trans. p. 7).

On page 35, after the period, in line 22, add the following:

"The company has shipped merchandise to Iowa customers by mail since 1872." (Trans. p. 9.)

On page 36, after the word "items," in line 14, add the following:

"or 15,000 to 18,000 stock keeping units" (Trans. p. 13).

On page 36, after the period, in line 26, add the following:

[fol. 126] "These orders contain a description of the merchandise." (Trans. p. 15.)

On page 37, after the period in line 3, add the following:

"The general method of handling mail order business, especially the method of keeping records, is the same in all our

mail order houses. There have been no material changes in this procedure during all the time I have been with the company." (Trans. p. 18.)

On page 38, strike the first comma appearing in line 17, and substitute therefor a semi-colon. (Trans. p. 22.)

On page 38, after the period appearing in line 25, add the following:

"The catalog from St. Paul instructs that the order be sent to St. Paul, catalogs from Kansas City that it be sent to Kansas City, etc." (Trans. p. 23.)

On page 40, strike lines 14 to and including the period in line 18, and substitute therefor the following:

"The spring and summer 1938 catalog was distributed to Iowa customers from the three mail order houses during January and early part of February, and the general catalogs for the fall and winter 1937-1938 were distributed from the three houses to the various Iowa customers during July and the early part of August. (Trans. p. 25.) It is a fact that orders sent in by customers very generally followed the instructions, using our blanks and filling them in as they are designed." (Trans. p. 26.)

[fol. 127] On page 41, after the period in line 21, add the following:

"The service is similar." (Trans. p. 29.)

On page 41, immediately before the word "desk," in line 24, add the following:

"mail order" (Trans. p. 20).

On page 41, strike from line 25 the words "and he", and all of line 26 and to the period in line 27, and substitute therefor the following:

"and they remit for the shipment at the time they remit for the merchandise. There are cases where the customer need not remit for the merchandise at that time, that is where the shipment is to be made C. O. D. or where (Trans. p. 30) the customer is to be billed for the cost of carriage, and other cases where the company extends credit to the customer.' " (Trans. p. 31.)

On page 41, after the word "customer", appearing in line 33, add the following:

"and the order is held until the report is received before it is either accepted or rejected," (Trans. p. 31).

On page 43, after the word "machine," appearing in line 5, add the following:

"that part is used for addressing labels for the order and for any future shipments to that customer" (Trans. p. 35).

On page 43, strike the word "card" in line 7, and substitute therefor the word "record." (Trans. p. 36.)

[fol. 128] On page 43, strike the two sentences following the period in line 7, and ending with the period in line 15, and substitute therefor the following:

"A customer's order, all of the original papers, and all copies made for use of the various merchandise divisions, are returned to the customer with the package of merchandise. No copy whatever is kept of these order blanks or other papers relating to the order for cash orders. The amount of sales to a particular customer is not necessarily the same as the amount which is recorded on the customer's stencil card. The factors that make for the variation are omissions, changes in price, substitutions, credit rejections. The index card is prepared and filled out prior to the time the order is priced. (Trans. p. 36.) The index card is the first activity after the remittance has been separated from the order. Omissions are cases where we do not have the merchandise or where the customer's specifications did not enable us to select the merchandise and we omit the order. These omissions amount to between 5 and 8 per cent (Trans. p. 37). There is no notation of credit rejections made on the index card. The rejection is after the order has passed the index. The amounts remitted by the customer vary from the actual amount of the order. These variations are caused by errors in calculating transportation costs, errors made by the customer in footing the bill, changes in the price of merchandise since the catalog was issued, or omissions or substitutions. These errors are not corrected prior to the time the order passes through the index department. These errors are caught, if anywhere, in the billing department after the order has been assembled and we are able to determine what part of it is

[fol. 129] being shipped and what part is not. (Trans. p. 38.) The fact as to omissions would be known in the merchandising division where the stock was carried and the orders filled. The customer's order which is in the forward files from which the billing is done from the entry sheet, would not show that record until after the order was assembled and ready to go to the carrier. It is the practice, in the event the customer remits more than his order, to refund it to him. If the customer has not remitted the amount of the order, he is sent a due bill or dun for the short remittance. We almost entirely fill an order if the remittance is less than the amount of the order, and we make no attempt to collect the deficiency on that order prior to the time it is shipped. The billing is sent to the customer afterwards.

Q. Basing your answer on your experience in the mail order business, why is it that practice is followed? (Trans. p. 39.)

Mr. Bookin: Objected to as calling for an opinion and conclusion of the witness, incompetent, irrelevant and immaterial to any issue in this case, no proper foundation having been laid, the witness not qualified.

A. Two reasons. First, the delay of waiting to complete the remittance would probably inconvenience the customer and he would be unsatisfied with the service; and the other reason is in the main the collections for the short remittance is made.

Q. What is the fact as to whether or not you send the shipment in the event the customer is short one or two or three cents in the amount of its order?

A. We don't bill for less than five cents.

Q. Basing your answer upon all of the facts which you have stated concerning the difference between the amount [fol. 130] of the order and the amount of the actual value of the merchandise, price of the merchandise sent the customer, what is the fact as to whether or not the index records actually give you a sales figure for the various customers indicated on the index card? (Trans. p. 40.)

Mr. Bookin: Objected to as incompetent, irrelevant and immaterial to any issue in the case, it is calling for an opinion and conclusion of the witness, and a determination

of an ultimate fact within the jurisdiction and province of the court.

A. The index card, the record does not show a record of sales. (Trans. p. 41.)

On page 43, after the period in line 24, add the following:

"The final record would be in the billing department after the order is abstracted." (Trans. p. 42.)

On page 43, after the period in line 28, add the following:

"The maintenance of such records would require additional handling of the orders in the mail order opening department. (Trans. p. 42.) We would have to segregate the orders from the State and put them in—flag them in some manner to call attention to the billing department, put a colored folder on them or colored flag. There would also be additional handling of the orders required in the time payment installment unit or in the credit department. It would require segregation of the billing of the customers from the State that is not now done. The billing is now [fol. 131] handled in the central time payment department. Considerable quantities of merchandise sold to customers are returned for credit. The adjustment department handles these returns. In order to establish a record of sales to Iowa customers in the operation of the adjustment department, it would be necessary to keep the record of returned (Trans. p. 43) goods in order to deduct that from the previously reported sale, necessary to keep separate records for the State of Iowa for sales allowances and adjustments of price which resulted from complaints. That would affect the sales total in the State. In the accounting and statistical department, additional records would have to be established in order to maintain a record of sales in the State of Iowa and the making of the tax return. And in the supply department, there would have to be added additional forms for handling of the records and for flagging of the orders to call the attention of the billers. Printing, stocking and supplying the additional forms." (Trans. p. 44.)

On page 43, before the period appearing in line 33, insert the following:

"in each of the departments mentioned." (Trans. p. 45.)

On page 44, at the top of the page before line 1, insert the following:

"I have had duties which required me to investigate or devise mail order procedure. When I was in the operating department, I wrote all of the operating procedure for a period of years and I now approve all procedures before they are issued. In the answers which I have given to the [fol. 132] various questions concerning the operations of the mail order houses, that experience has entered into my answers." (Trans. p. 46.)

On page 44, after the period in line 10, add the following:

Q. In the course of your experience in the mail order business, have you observed whether or not the length of time required to fill the order have any affect and re- (Trans. p. 48) sult in the number of complaints made by customers?

Mr. Bookin: Objected to as calling for an opinion and conclusion of the witness, the witness not properly qualified, incompetent, irrelevant and immaterial.

A. There is a direct relation, measurable relation between the time required to fill an order and the dissatisfaction of the customer evidenced by his complaint.

Q. And have you at any time brought any study personally on the reason for that connection?

A. Yes, often.

Q. What are the reasons why that is true?

Mr. Bookin: Objected to as calling for an opinion and conclusion of the witness, hearsay, and incompetent, irrelevant and immaterial to any of the issues in this case.

A. Dissatisfaction of the customer with the delay." (Trans. p. 49.)

On page 46, after the word "Spiegel," in line 21, add the following:

"Incorporated, the Spiegel, May, Stern Company." (Trans. p. 56).

[fol. 133] On page 46, after the period appearing in line 28, add the following:

"I have had to do personally with the turning over of these remittances to the other mail order houses (Trans. p. 57)

and these remittances that I have turned over to other mail order houses have been from some of our customers.

Q. And have any of those remittances been ordered from your (Trans. p. 57) customers?

Mr. Bookin: Same objection as heretofore urged to the last question. (Which was incompetent, irrelevant and immaterial to any issue in this case, calling for the opinion and conclusion of the witness, hearsay.)

A. Yes, sir.

Q. Have you ever observed from your customers' correspondence addressed to Spiegel, May, Stearn Company delivered to Montgomery Ward Company?

Mr. Bookin: Same objection as last urged.

A. Yes.

Q. And the same question with regard to the Chicago Mail Order Company and Bellas-Hess?

Mr. Bookin: Same objection as last made.

A. Same answer.

Q. In connection with your duties as treasurer and the supervision which you exercise over the accounts receivable of the corporation, have you caused credit reports to be made of Iowa customers who have applied for credit with Montgomery Ward & Company of the mail order houses of Montgomery Ward & Company?

Mr. Bookin: Same objection as last urged.

A. Yes.

Q. And have you ascertained from such correspondence [fol. 134] with (Trans. p. 58) such customers whether or not they have accounts with any of the other companies named?

Mr. Bookin: Same objection as last urged.

A. Yes.

The catalogs of Sears, Roebuck & Company, Chicago Mail Order Company, Spiegel and National Bellas-Hess are very competitive to the merchandise displayed in the catalogs distributed by Montgomery Ward & Company. The description and price of the merchandise that we buy, and of the other catalogs, compare with our own. I am familiar with the fact that our company does actually receive orders from Iowa customers at Chicago, Illinois, Kansas City and

St. Paul, and that is a considerable volume of business. (Trans. p. 59.) I know that the other mail order companies do business with our Iowa customers. The number of such instances I have observed would run into many thousands." (Trans. p. 60.)

On page 47, after the period in line 2, insert the following:

"My information is based on the attempts we have made to print separate catalogs for different sections of the country having different climatic conditions. (Trans. p. 63.) I have made a study of the costs of the various parts of the catalog over a period of twenty years as a part of my duty with Montgomery Ward & Company, as a part of the expense control." (Trans. p. 64.)

On page 47, after the period in line 15, add the following:

[fol. 135] "I have had occasion to make specific studies to this effect." (Trans. p. 65.)

On page 47, strike the word "some" appearing in line 29. (Trans. p. 67.)

On page 47, after the period in line 33, add the following:

"These stores make sales to Iowa customers." (Trans. p. 67.)

On page 48, after the period in line 2, add the following:

"Q. Basing your answer upon your experience in the operation of a retail business and merchandise business generally, would it be possible to tell when a customer came into one of those border stores you have named whether or not that customer was a resident of the State of Iowa or intended to use the merchandise for use in the State of Iowa?

Mr. Bookin: Objected to for the reasons urged in the previous objection (calling for an opinion and conclusion, hearsay, not the best evidence, immaterial to any issue in this case).

A. I know of no way that you could determine that." (Trans. p. 69.)

On page 48, strike the period after the word "area" in line 4, and add the following:

"in competition with Montgomery Ward & Company." (Trans. p. 69.)

On page 49, after the period in line 32, add the following:

[fol. 136] "The schedule of orders is done after the index. It would not be possible to do the indexing of orders at a later stage without delaying the order. That has been attempted within the last year at one of the mail order houses. It was found to be too inaccurate and prohibitively expensive. (Trans. p. 73.) The index has been described as a card containing a stencil card, the stencil card is used to make labels with the customer's name and address cut by a stencil cutting machine. That can be placed on the label, a roller with ink rolled over it and the name and address is thereby put on the label or the labels as are required. The index for each one of the houses occupies a very large space. If the record of sales or cards were kept in one part and the stencils kept in another part of the building, it would not be possible to keep both sets of records without increase in the amount of space required. That could not be done without duplication of entry expense. Orders from Iowa customers to Chicago, Kansas City and St. Paul could not be billed from merchandise already on hand kept by the company in the State of Iowa. (Trans. p. 74.) Practically all of the customers sending in their Iowa orders follow the form and the various guides set forth in the catalogs and order blanks. The catalogs are all printed in Chicago."

On page 49, immediately following the first word "the" in line 33, insert the following:

"three" (Trans. p. 75).

On page 50, after the period in line 2, add the following:

[fol. 137] "There is no maximum in the way of physical layout nor any place to put employees nor place to store the merchandise where that could be done by the employes within the State of Iowa." (Trans. p. 75.)

On page 50, strike the period in line 4, and add the following:

"through solicitation of these customers." (Trans. p. 76.)

On page 50, after the period in line 15, add the following: (Trans. p. 75.)

"I have observed correspondence of customers comparing the merchandise through Montgomery Ward & Company

catalogs and that purchased from local merchants. That is true of customers from Iowa. (Trans. p. 78.)

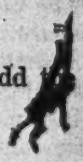
Q. What has been your observation as to whether or not such comparisons indicated that there was competitive relationship between the mail order business and the business conducted by local retailers in the State of Iowa?

Mr. Bookin: Objected to as calling for an opinion and conclusion of the witness, not the best evidence, incompetent, irrelevant and immaterial to any issue in this case, hearsay.

A. Most of the correspondence has to do with the competitive feature, that of price." (Trans. p. 78.)

Cross-examination:

On page 51, after the word "made" in line 9, add the following:



"at the indexing department" (Trans. p. 81).

[fol. 138] On page 51, after the word "but", in line 13, add the following:

"that was terminated when the Illinois corporation qualified to do business in Iowa." (Trans. p. 83.)

On page 51, strike the word "store" appearing at the end of line 15, and substitute therefor the following:

"retail stores in Iowa" (Trans. p. 84).

On page 51, strike from lines 25 and 26, the words "used to convey information to the customer," and substitute therefor the following:

"the tip-ons are only used to convey information to the customer," (Trans. p. 85).

On page 52, after the word "stencil" in line 19, add the following:

"and on the index card we keep the amount of the order" (Trans. p. 87).

On page 52, strike the words "total business" appearing in line 21, and substitute therefor the following:

"mail order business" (Trans. p. 88).

On page 52, strike the period in line 24, following the word "approximated," and add, after said word, the following:

", not established with anywhere near definiteness. (Trans. p. 88.) I don't believe that by making certain allowances, you could establish it within a degree or fraction of a percentage. The percentage of increase of complaints as compared with service can be definitely established to within a fraction or a degree. The statistical department, in this [fol. 139] other matter is unable to operate as efficiently from these records because they do not provide the information in as accurate a form. These records are only of orders. The sale can vary considerably from the order. Part of the instructions to guide the customer are contained in the order blank, Exhibit 'H', and there is another page in the catalog which gives suggestions and helps for filling out the order." (Trans. p. 89.)

On page 53, strike from lines 25, 26 and 27 the words:

"for the expense connected with the employment and wages of the person in the catalog station," and substitute therefor the following:

"on sales alone, based on these orders." (Trans. p. 96.)

On page 53, strike from line 29, the words: "whatever order is received or sent in", and substitute therefor the following:

"sales made as a result of the order" (Trans. p. 97.)

On page 53, after the period in line 31, add the following:

"His salary is based on the volume of sales; his bonus is on the net profits of the store. (Trans. p. 97.) There is no special incentive offered the manager to obtain as many mail order sales as he possibly can other than the income he would derive from his bonus from commissions." (Trans. p. 98.)

On page 53, after the period in line 33, add the following:

"It was not the purpose of our retail stores to act as a leader and an enlarger for our mail order business." (Trans. p. 98.)

[fol. 140] On page 54, before line 1 on said page, insert the following:

"Once we obtain a mail order customer through the store, thereafter we seek by means of catalog activities to acquire as much of that customer's business by direct mail as possible." (Trans. p. 98.)

On page 54, after the period at the end of line 18, add the following:

"The collections of Illinois sales tax takes additional time which entails additional labor and cost. Special records are kept in the accounting department for the Illinois sales tax." (Trans. pp. 100, 101.)

On page 54, strike from lines 25 and 26, the following:

"and practically everything I testified to was some report somebody had handed to me,"

and substitute therefor the following:

"I do not agree with the statement that most of the stuff I testified to was that of which I had no personal information." (Trans. pp. 102, 103.)

On page 55, following the word "that," in line 2, add the word "approximately". (Trans. p. 104.)

On page 55, strike the period in line 12, and add the following:

"We do not have a record of our Iowa sales." (Trans. p. 105.)

On page 55, between the words "the" and "tax" appearing in line 13, insert the word "sales". (Trans. p. 105.)

On page 55, following the period in line 22, add the following:

[fol. 141] "We make no comparison of prices in our catalogs with prices in our retail stores." (Trans. p. 107.)

On page 55, immediately following the comma in line 26, insert the following:

"the difference in price is pretty near accounted for by the difference in transportation cost, the customer paying

in one case and the corporation in the other," (Trans. p. 107.)

On page 55, strike the word "of" at the beginning of line 33, and substitute therefor the word "or". (Trans. p. 109.)

Redirect examination:

On page 56, strike the words "process of filling the mail orders" appearing in lines 11 and 12, and substitute therefor the following:

"total time in handling the order beyond the actual time taken to perform the activities themselves. (Trans. p. 110.) This is because of line time, in order to keep a clerk occupied you have to keep before her a certain bank of work so that she will not run out of work and sit idle, so your line of time before each activity is greater than the time required to perform the service of the order. So if we assume each state serviced by the Chicago house has a sales or use tax and the company is required to collect such taxes, it would not be possible to collect these taxes and do the work with the number of billers which are now used to fill orders received by the Chicago house." (Trans. p. 111.)

[fol. 142] J. H. Schneider, called and sworn, testified on behalf of the plaintiff, as follows:

Direct examination:

On page 57, after the period in line 18, add the following:

"Montgomery Ward & Company sells personal property from its Chicago mail order house to residents of Illinois. Illinois has a tax measured by retail sales." (Trans. p. 117.)

On page 57, strike from line 20 the word "from" and substitute therefor the word "of". (Trans. p. 118.)

On page 58, after the period in line 9, add the following:

"It makes no difference whether the notice is printed on the order blank or a tip-on is used. The percentage runs about the same." (Trans. p. 121.)

On page 58, following the word "order", in line 11, insert the following:

"because to withhold the order means slowing up the procedure and that fewer orders will be filled during the day, and the service to the customer will be impaired, which might lead to loss of business." (Trans. pp. 121, 122.)

On page 58, after the word "tax" appearing at the end of line 58, add the following:

"where Montgomery Ward has mail order houses." (Trans. p. 126.)

[fol. 143] On page 59, following the period in line 5, add the following:

"That system would be in addition to the system which is already in use in connection with the Illinois Retailers Occupational Tax." (Trans. p. 129.)

Earl Ryan, called and sworn, testified for the plaintiff, as follows:

Direct examination:

On page 59, following the period in line 25, add the following:

"None of them have been licensed to do business in Iowa." (Trans. p. 131.)

J. H. Schneider resumed the stand.

Direct examination:

On page 60, after the word "cost", in line 22, insert the following:

"of collecting per $10,000 of Iowa Use Tax" (Trans. p. 136).

On page 60, following the word "bills" in line 31, insert the following:

"for the Iowa Use Tax". (Trans. 138.)

On page 60, following the period in line 31, add the following:

"As manager of the tax department, I investigate the record and supervise the making of the record with respect to due bills. Based on my experience and studies in connection with the collection of the Illinois Retail Occupa-[fol. 144] tional Tax, and in other states, and in connection with the sales tax collections by other mail order houses in other states, it is my opinion that about 42% of the Iowa Use Tax could be collected by the Chicago mail order house." (Trans. p. 139.)

On page 60, after the period in line 34, add the following:

"The only possible method that could be used by Montgomery Ward to collect the Iowa Use Tax on sales made from its mail order houses direct to Iowa customers until the next catalog is issued, would be that of issuing due bills for all deficiencies. During this period, it would cost the company about $6,840 to collect $10,000 of Iowa Use Tax. The so-called due-bills are sent to the customers at the time the various items of merchandise are assembled, wrapped and packed in the billing department after the biller has determined the amount of the order." (Trans. pp. 140, 141.)

On page 60, strike the sentence beginning in line 34, and ending in line 1, on page 61, and substitute therefor the following:

"In my opinion, based upon by knowledge and experience and the studies I have made, if the tip-on or notice in the order blank were not used by Montgomery Ward & Company, the Iowa Use Tax could not be collected. From the inception of the Act until Montgomery Ward & Company started sending due-bills to its customers, the liability imposed on Montgomery Ward & Company would be 100% of the amount of the tax involved." (Trans. p. 143.)

[fol. 145] On page 61, after the word "Iowa", in line 5, insert the following:

"Use Tax and Illinois Retailers Occupational Tax" (Trans. p. 144).

On page 61, immediately before the word "tax," in line 7, insert the following:

"Iowa Sales" (Trans. p. 144).

On page 61, immediately before the word "cost" appearing in line 7, insert the word "direct". (Trans. p. 145.)

On page 61, strike the word "It" at the beginning of the sentence appearing in line 9, and insert, in lieu thereof, the following:

"The cost to Montgomery Ward & Company of collecting the Iowa Sales Tax" (Trans. p. 146).

On page 61, immediately after the period in line 14, add the following:

"The cost of collecting the sales tax or use tax in the mail order houses is greater than the cost of collecting either tax in a retail store." (Trans. p. 147.)

Cross-examination:

On page 61, after the period appearing in line 25, add the following:

"There are many many accounts carried on time payment, accounts carried in the mail order house in the credit department for some particular town where a store may be located, and there is no connection whatever in the collection of those accounts." (Trans. p. 149.)

[fol. 146] On page 61, after the period in line 29, add the following:

"It is not the practice of the company to refer its mail order accounts to the particular store located in the vicinity of the customer's residence, in those cases in which the ordinary collection letters and follow-ups fail to bring about the payment of the account." (Trans. pp. 150-151.)

On page 62, strike the word "not" appearing in line 17, and substitute therefor the word "now". (Trans. p. 151.)

CERTIFICATE OF RECORD

We hereby certify that the above and foregoing Appellee's Denial of and Amendment to Appellant's Abstract of Record, together with Appellant's Abstract of Record, comprise a full and complete abstract of record of all pleadings, evidence and testimony produced, the record made, and the proceedings had upon the trial of said case.

Parrish, Guthrie, Colflesh & O'Brien, Attorneys for Appellee.

NOTICE OF ORAL ARGUMENT

Notice is hereby given that counsel for appellee will ask to be heard orally upon the submission of this cause.

Parrish, Guthrie, Colflesh & O'Brien, Attorneys for Appellee.

[fols. 147-148] CERTIFICATE OF COST

We hereby certify that the cost of printing the above and foregoing Appellee's Denial of and Amendment to Appellant's Abstract of Record and Notice of Oral Argument was the sum of $26.00.

Parrish, Guthrie, Colflesh & O'Brien, Attorneys for Appellee.

[fols. 149-150] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 151] IN SUPREME COURT OF IOWA, SEPTEMBER TERM, 1939

Equity

MONTGOMERY WARD & Co., Incorporated, Appellee,

vs.

LOUIS E. RODDEWIG, D. L. MURROW, and C. F. GUBBE, Individually and as Members of the Iowa State Board of Assessment and Review, Appellants

Appeal from District Court of Polk County, Iowa, Honorable John J. Halloran, Judge

OPINION OF THE COURT—Rendered May 14, 1940

[fol. 152] Suit in equity to enjoin defendants, as members of the State Board of Assessment and Review, from undertaking to cancel plaintiff's permit to do business in Iowa for failure to pay a use tax on mail order sales and retail sales made by plaintiff outside of Iowa. The court granted the injunction. Defendants appeal. Affirmed.

MILLER, J.:

Some of the questions presented in this case are identical with those presented for our determination in the case of

Sears, Roebuck & Co. v. Roddewig, et al., — Iowa —, — N. W. —, decided at this term. The decree appealed from ordered the same type of an injunction as was involved in that case. For the reasons there stated, the decree must be affirmed in all particulars where the two cases are identical.

One question is presented by the record herein which was not presented in the Sears, Roebuck & Co. case. That question is whether the plaintiff can be required to collect the use tax on sales made in retail stores located near, but outside, the boundaries of the State of Iowa, some of which are located at Austin, Minnesota, Maryville, Missouri, Nebraska City, Nebraska, Sioux Falls, South Dakota, and Moline, Illinois, where the purchaser is a resident of Iowa and purchases the property for use in this state. The court enjoined the defendants from undertaking to require plaintiff to collect a use tax on such sales. The position there taken by us in the Sears, Roebuck & Co. case demonstrates that the action of the court was right.

Accordingly, the decree appealed from, in all of its particulars, must be and it is—Affirmed.

Sager, Hale, Bliss and Oliver concur.

Hamilton, C. J., Mitchell, Richards and Stiger, J. J., dissent.

[fol. 153] DISSENTING OPINION

Hamilton, C. J., dissents:

Being unable to agree with the majority opinion in so far as it pertains to mail order business, I respectfully dissent. My views are expressed in my dissenting opinion filed in the companion case, Sears, Roebuck & Company v. Louis E. Roddewig, et al., opinion in which case was handed down at this period of our court, — N. W. —.

There is, however, still another type of business carried on by appellee herein which was not involved or presented by the record in the Sears, Roebuck & Company case, and which is of little consequence, yet, under the issues, requires consideration and determination, namely, business or sales made direct to Iowa customers by appellee in its stores located near, but outside, the boundaries of the State of Iowa, some of which are located at Austin, Minnesota, Maryville, Missouri, Nebraska City, Nebraska, Sioux Falls, South Dakota, and Moline, Illinois. The quantity of business transacted by appellee with Iowa customers at these various

stores is not found in the record, but, of course, is inconsequential as compared with "mail order business". Some of these sales are made direct and are over-the-counter transactions and, as to such sales, the appellee has no feasable way of knowing or ascertaining where the customer lives or where he is going to make use of the merchandise purchased. A person living in Iowa might purchase articles for use in Iowa from the stores located out of the state named above or at some of appellee's stores located in any state in the Union; the user in Iowa would, of course, be liable for the tax, but to require the appellee to know or ascertain, and segregate from its millions of customers which ones were from Iowa and require appellee to collect and remit the tax on such sales is to impose upon appellee an almost impossible task and imposes upon the seller a burden so unreasonable, arbitrary and capricious as to in-
[fol. 154] vade its constitutional rights under the due process clause of the Federal Constitution and, therefore, requires the court to hold that, as to such sales, the regulatory requirements of the Use Tax Act, requiring the seller to collect the tax, is invalid and, hence, not enforceable against appellee, and, in this respect and as to such sales, the restraining order of the trial court should be upheld, but, in all other respects, the decree of the trial court should, we think, be reversed.

Stiger and Richards, J. J., join in dissent.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 155] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Iowa is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Stone and Mr. Justice Roberts took no part in the consideration and decision of this application.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 255

LOUIS E. RODDEWIG, AS CHAIRMAN OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY; D. L. MURROW AND C. FRANK GREEN, AS MEMBERS OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY,

Petitioners,

vs.

SEARS, ROEBUCK AND CO.

No. 256

LOUIS E. RODDEWIG, AS CHAIRMAN OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY; D. L. MURROW AND C. FRANK GREEN, AS MEMBERS OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY,

Petitioners,

vs.

MONTGOMERY WARD AND CO., INCORPORATED.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA AND BRIEF IN SUPPORT THEREOF.

JOHN M. RANKIN,
Attorney General of the State of Iowa,
JOHN E. MULRONEY,
Assistant Attorney General,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 255

LOUIS E. RODDEWIG, AS CHAIRMAN OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY; D. L. MURROW AND C. FRANK GREEN, AS MEMBERS OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY,

vs.

Petitioners,

SEARS, ROEBUCK AND CO.

No. 256

LOUIS E. RODDEWIG, AS CHAIRMAN OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY; D. L. MURROW AND C. FRANK GREEN, AS MEMBERS OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY,

vs.

Petitioners,

MONTGOMERY WARD AND CO., INCORPORATED.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Louis E. Roddewig, D. L. Murrow and C. Frank Green, as members of the Iowa State Board of Assessment and Review pray that Writs of Certiorari issue

to review the judgments of the Supreme Court of the State of Iowa entered in the above cases on May 14, 1940, confirming judgments of the District Court of Polk County, Iowa, dated October 13, 1938, and by their counsel petitioners respectfully show:

Record References.

The two cases involve identical questions of law and to a very great extent identical questions of fact. They were not consolidated for trial in the District Court of Polk County, but that court rendered identical opinions and decrees and the cases were orally argued together in the Supreme Court of Iowa. Separate records have been filed and we will designate the record reference in the Sears, Roebuck case as "R. S." and the record in the Montgomery Ward & Company case as "R. M.".

Summary Statement of the Matter Involved.

Sears, Roebuck and Company and Montgomery Ward and Company are non-resident corporations licensed to do business in the State of Iowa. Pursuant to such licenses they have established and are now conducting various retail stores in Iowa. In addition to the businesses conducted in Iowa, these corporations each conduct a mail order business through mail order stores or establishments located outside of Iowa. From time to time mail order catalogs are sent to prospective customers in Iowa and the Iowa customers send orders by mail to such mail order stores located outside of Iowa and the orders are there filled and the merchandise shipped to the purchasers in Iowa.

The Iowa Use Tax Act provides that every retailer maintaining a place of business in the State and making sales of tangible personal property for use in the State shall at

the time of the making of the sale, whether within or without the State, collect 2% use tax from the purchaser. Other provisions of the Act provide that the tax shall constitute a debt owed by the retailer to the State and further that whenever the retailer maintaining a place of business in the State is a corporation authorized to do business in Iowa and fails to comply with the provisions of the Iowa Use Tax Act, then the retailer's license and the permit authorizing the corporation to do business in the State of Iowa may be revoked.

Sears, Roebuck and Company and Montgomery Ward and Company, hereafter called the corporations, have not collected or paid a use tax on such mail order sales to the Iowa residents. Louis E. Boddewig, D. L. Murrow and C. Frank Green, members of the Iowa State Board of Assessment and Review, hereafter called the Board, adopted a resolution threatening to revoke the corporations' retailers licenses and permits to do business in Iowa for failure to collect and pay the use tax on mail order sales of tangible personal property to the residents of Iowa.

The corporations each sought an injunction restraining the Board from taking any action to secure the revocation of their retailers licenses or permits to do business in Iowa. The Polk County Iowa District Court granted the injunctions holding the Iowa Use Tax Law, insofar as it purports to authorize the Board to insist upon the corporations collecting the tax on mail order sales made to persons in Iowa through mail order establishments located outside of Iowa, is unconstitutional, being contrary to Section 1 Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment thereto.

Upon appeal to the Supreme Court of Iowa the decisions of the lower court were affirmed (the Chief Justice and three other Justices dissenting) upon the same ground, viz: the Iowa Use Tax Law, insofar as it purports to compel the

corporations to collect the 2% tax from Iowa purchasers in mail order transactions under penalty of revocation of the corporations' retailers licenses and permits to do business in Iowa, is in violation of Section 8 of Article I of the United States Constitution, and Section 1 of the Fourteenth Amendment thereto.

Opinions of the Court Below.

The opinion of the Iowa Supreme Court in the *Sears, Roebuck* case is the controlling opinion and it is reported in 292 N. W. 130 and is found in the record (R. S. 130).

The opinion of the Iowa Supreme Court in the *Montgomery Ward* case is reported in 292 N. W. 142 and is found in the record (R. M. 151).

Jurisdictional Statement.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States to review by writ of certiorari the judgments of the Supreme Court of Iowa is Section 237(b) of the Judicial Code, as amended, United States Code Annotated, Title 28, Section 344(b) which provides:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution * * * of the United States; * * * and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

Cases which also sustain the jurisdiction of the Supreme Court of the United States to review these judgments by certiorari are *State of Minnesota* v. *Blasius*, 290 U. S. 1, 78 L. Ed. 131 (1933); and *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, 83 L. Ed. 752 (1939).

Statutes of the State of Iowa the Validation of Which is Involved.

The statutes of the State of Iowa, the validity of which is involved when applied to corporations' mail order businesses are the payment and collection statutes of the Iowa Use Tax Law, being Sections 6943.109, 6943.112 and 6943.122 of the 1939 Code of Iowa (Appendix B). Section 6943.109 provides that retailers maintaining a place of business in the State and making sales of tangible personal property for use in the State "shall at the time of making such sales, whether within or without the State, collect the tax imposed * * *."

Section 6943.112 provides that "any tax collected by any retailer pursuant to said sections shall constitute a debt owed by the retailer to this State."

Section 6943.122 provides that whenever the retailer maintaining a place of business in Iowa is a corporation authorized to do business in Iowa and said corporation fails to comply with the provisions of the Act, then the corporation's retail license and permit to do business in Iowa may be revoked.

The final judgments are the decisions of the Supreme Court of the State of Iowa filed in the office of the Clerk of the Supreme Court of Iowa on April 14, 1940 affirming the action of the trial court in granting injunctions restraining the proposed action of the Board toward revoking the corporations' retailers licenses and permits to do business in Iowa (R. S. 130 and R. M. 151). The date upon which

the application for writs of certiorari is presented is the 18th day of July, 1940.

The Validity of a Statute of a State on the Ground of Its Being Repugnant to the Federal Constitution is Involved in These Cases.

The Supreme Court of the State of Iowa, the highest court of that State, held that the collection and payment provisions of the Iowa Use Tax Law as applied to the corporations' mail order businesses constituted a violation of Section 8 of Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment thereto (R. S. 134, 136, 142 and R. M. 152). These collection and payment provisions of the Iowa Use Tax Law were all assailed as being repugnant to the above provisions of the United States Constitution in the *Sears, Roebuck* case in the petition filed by that corporation in paragraphs 10, 11 and 13 (R. S. 12-19).

In the *Montgomery Ward and Company* case the collection and payment provisions of the Iowa Use Tax Act were all assailed as being repugnant to the above provisions of the United States Constitution in the petition filed by Montgomery Ward and Company in paragraphs 21(a) and 21(c) (R. M. 9 and 11).

These allegations were denied in the answer filed by the Board and specifically denied in paragraph 14 of the answer in the *Sears, Roebuck* case (R. S. 41 and 42) and in the second paragraph of the numbered paragraph 4 in the answer in the *Montgomery Ward and Company* case (R. M. 31).

When all the testimony had been presented the trial court rendered a written opinion holding the collection and payment provisions of the Iowa Use Tax Act infringed upon the constitutional rights of the corporation, in the following

language, which appears in R. S. 106 and R. M. 106 and 107 as follows:

> "As indicated by the reasoning of the court in the instant case and in this opinion, this court is of the opinion, and so holds, that the attempt by the State of Iowa, through the medium of the defendants, the Board of Assessment and Review of the state, to interpret and apply the statute so as to make it obligatory upon the plaintiff to collect the use tax on these items of exclusive mail order transactions wherein the fact situation is as already outlined herein, is clearly violative of the constitutional rights of the plaintiff in regard to invading the rights of the plaintiff under Section 1 of the 14th Amendment to the Constitution of the United States, and in regard to Section 8 of Article 1, of said Constitution."

The Supreme Court of the State of Iowa in its decisions in these cases upheld the decisions of the trial court and we quote from the controlling opinion in the *Sears, Roebuck* case as follows (R. S. 134 and 135):

> "The court held that the use tax law, insofar as it purports to authorize the defendants to insist upon plaintiff collecting and paying the use tax on mail order sales made to persons in Iowa through the mail order establishments located outside of Iowa, is unconstitutional and void, being contrary to Section 8 of Article I of the Constitution of the United States, and Section 1 of the 14th Amendment thereto. A permanent injunction was granted restraining defendants from making any finding that plaintiff has failed to comply with the provisions of the Iowa use tax law or taking any action to secure the revocation or cancellation of its sales permit covering the operation of its retail stores in Iowa or its license to do business as a foreign corporation in this state. From this decree defendants have appealed. * * *
>
> "The question presented is whether Section 6943.109, requiring plaintiff to collect the tax on mail order sales

made without the state, is constitutional when considered with the provision that, under Section 6943.112, the tax, collected or required to be collected, is a debt of plaintiff, and, upon a finding that plaintiff has failed to pay such debt, under Section 6943.122 plaintiff's permit to do business as a foreign corporation in this state must be revoked. We are of the opinion that the court correctly held that the provisions of the chapter, as applied to the mail order sales shown by the record herein, are unconstitutional and, therefore, void."

The question presented in these cases is a question of substance. The immediate amounts involved are large (2% of the gross sales in the *Sears, Roebuck* case alone, which sales totalled $5,400,000 in a single year. R. S. 88). In case the application for this writ is denied, the State of Iowa will be denied the right to collect approximately half a million dollars. Other States are vitally interested in a determination of the issues here involved. Over half of the States and New York City have a general sales tax and at least eighteen States have a use tax that imposes the duty of collection upon sellers within their jurisdiction.

Questions Presented.

The questions presented in these cases are as follows:

1. Do the collection and payment provisions of the Iowa Use Tax Law as applied to the corporations' mail order businesses amount to extraterritorial operation of the law within the prohibition of the 14th Amendment to the Constitution of the United States?

2. Do the collection and payment provisions of the Iowa Use Tax Law as applied to the corporations' mail order businesses impose a tax upon their activities without the State within the prohibition of the 14th Amendment to the Constitution of the United States?

3. Do the collection and payment provisions of the Iowa Use Tax Law as applied to the corporations' mail order

business agents in a discriminatory manner within the prohibition of the 14th Amendment to the Constitution of the United States?

4. Do the collection and payment provisions of the Iowa Use Tax Law as applied to corporations' mail order businesses impose an unconstitutional burden on interstate commerce?

5. Do the provisions of the Iowa Use Tax Law providing for the revocation of the corporations' retail licenses and permits to do business in Iowa upon failure to collect and pay the Iowa use tax upon mail order sales violate any constitutional rights guaranteed to the corporations under the 14th Amendment to the Constitution of the United States?

Assignment of Errors.

It is submitted that the Supreme Court of Iowa erred in holding:

(a) That the collection and payment provisions of the Iowa Use Tax Law as applied to the corporations' mail order businesses amounted to extraterritorial operation of the Iowa laws within the prohibition of the 14th Amendment to the Constitution of the United States;

(b) That the collection and payment provisions of the Iowa Use Tax Laws as applied to the corporations' mail order businesses imposed a tax upon their activities outside of the State within the prohibition of the 14th Amendment to the Constitution of the United States;

(c) That the collection and payment provisions of the Iowa Use Tax Law as applied to the corporations' mail order businesses imposed an unconstitutional burden on interstate commerce.

(d) In regarding itself as compelled by Section 8 Article I of the Constitution of the United States and Section 1 of the 14th Amendment thereto to affirm the ruling of the Polk County District Court restraining the Board from taking steps to cancel the permits and retail licenses of the corpora-

tions for failure to collect or pay the tax on mail order sales to Iowa residents.

Reasons Relied On for Allowance of the Writs.

The reasons relied on by petitioners for allowance of the writs are as follows:

1. As already pointed out, the questions presented in these cases are questions of substance involving the right of the State of Iowa to collect a tax of approximately half a million dollars.

2. Petitioners contend that in holding the Iowa Use Tax Act as applied to the corporations' mail order businesses constitutes an unconstitutional burden upon interstate commerce, the Supreme Court of Iowa has decided a Federal question of substance in a way probably not in accord with the applicable decisions of this Court which cases we cite in the subjoined brief.

3. Petitioners contend that in holding the Iowa Use Tax Act, insofar as it compels the mail order corporations to collect the use tax, violates Section 1 of the 14th Amendment to the Constitution, the Supreme Court of Iowa has decided a Federal question of substance in a way probably not in accord with the applicable decisions of this Court, which we cite in the subjoined brief.

4. The decision of the Supreme Court of Iowa unduly limits the taxing power of the State of Iowa, for the power to compel the seller to collect the sales or use tax from the purchaser is recognized as necessary to the proper enforcement of the tax act.

5. The decisions of this Court have never gone so far as to say that a company doing some interstate business may not, when it enters a foreign State, be compelled to assume the burden borne by domestic sellers of collecting from its

customers and transmitting to the authorities a sales tax imposed upon such customers by local law *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 78 L. Ed. 1141, 54 S. Ct. 575; *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62, 83 L. Ed. 488, 59 S. Ct. 376; *McGoldrick* v. *Berwind White Coal Mining Co.*, 309 U. S. 33, 84 L. Ed. Adv. Op. 343, 60 S. Ct. 388. To hold otherwise would mean that foreign vendors could obtain unjustifiable advantages over local competitors who are required to collect the 2% tax, and thus forms of tax avoidance and tax evasion are fostered.

WHEREFORE, your petitioners respectfully pray that Writs of Certiorari be issued out of and under the Seal of this Honorable Court directed to the Supreme Court of the State of Iowa commanding that court to certify and send to this Court, for its review and determination, a full and complete transcript of the records and all proceedings of said Supreme Court had in the cases numbered and entitled on its docket, Nos. 44997-44963, *Sears, Roebuck* v. *Roddewig*, *Montgomery Ward & Co., Inc.*, v. *Roddewig et al.*, to the end that the decisions and judgments of said Supreme Court may be reviewed and reversed by this Honorable Court and that judgment may be entered for these petitioners.

STATE OF IOWA,
By JOHN M. RANKIN,
Attorney General of the
State of Iowa;
JOHN E. MULRONEY,
Assistant Attorney General.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 255

LOUIS E. RODDEWIG, AS CHAIRMAN OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY; D. L. MURROW AND C. FRANK GREEN, AS MEMBERS OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY,

Petitioners,

vs.

SEARS, ROEBUCK AND CO.

No. 256

LOUIS E. RODDEWIG, AS CHAIRMAN OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY; D. L. MURROW AND C. FRANK GREEN, AS MEMBERS OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY,

Petitioners,

vs.

MONTGOMERY WARD AND CO., INCORPORATED.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

Statement of the Case.

The facts of the two cases are stated adequately in the petition for the writs of certiorari.

ARGUMENT.

Point I—The Iowa Sales Tax Law and the Iowa Use Tax Law present a plan for taxing all retail purchases in Iowa.

We have set forth in Appendix "A" the Iowa Sales Tax Law and in Appendix "B" the Iowa Use Tax Law. The Iowa Sales Tax Law is set forth for the purpose of showing that the use tax law, the collection and payment features of which are here involved, is complementary to the sales tax law.

This plan is identical with the plan employed by the State of Washington in connection with its sales tax and compensating tax, and the State of California in connection with its sales and use tax. See *Henneford* v. *Silas-Mason Company*, 300 U. S. 577, 81 L. Ed. 814, 57 S. Ct. 524, and *Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62, 83 L. Ed. 488, 59 S. Ct. 376. In *Henneford* v. *Silas-Mason Company* the United States Supreme Court took into consideration the complementary features of the act and the taxing system employed. For the purpose of the consideration of the issues involved in these cases, we submit the two taxing acts should be considered together as constituting a single entire plan of taxation.

Point II—The collection and payment provisions of the Iowa Use Tax Law as applied to the corporations' mail Order businesses do not amount to extraterritorial operation of the law within the prohibition of the 14th Amendment to the Constitution of the United States.

We do not feel that anything can be added by way of argument to the statements made by Chief Justice Hamilton in the dissenting opinion in the *Sears, Roebuck* case (R. S. 150 to 154).

There, Chief Justice Hamilton points out that the theory of the majority opinion that to require the seller to collect the tax is an attempt to regulate an out-of-state activity

forbidden by the 14th Amendment to the Constitution is erroneous in that the situation is exactly the same as that which existed in the case of *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62, 83 L. Ed. 488, 59 S. Ct. 376.

Chief Justice Hamilton quotes at length from the *Felt & Tarrant Company* decision and points out that the issue of extraterritoriality was involved in that case and decided against the petitioners.

As Chief Justice Hamilton points out, the same issue was involved in the *Monamotor Oil Company* v. *Johnson*, 292 U. S. 86, 78 L. Ed. 1141, 54 S. Ct. 575 (R. S. 156).

Point III—The collection and payment provisions of the Iowa Use Tax Law as applied to corporations' mail order businesses do not impose an unconstitutional burden on interstate commerce.

The main types of applicable situations where certain taxes were held to be an unconstitutional burden on interstate commerce were recently summarized in the opinion in *McGoldrick* v. *Berwind White Coal Mining Co.*, 309 U. S. 33, 84 L. Ed. Adv. Ops. 343, 60 S. Ct. 388. It seems to be settled by that case, and other leading cases on the subject that where a tax is nondiscriminatory and where it does not impose unwarranted licensing requirements, it will be upheld, provided there is no possibility of multiple taxation. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 82 L. Ed. 823; *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 82 L. Ed. 1365; *Coverdale* v. *Arkansas-Louisiana Pipe Line Company*, 303 U. S. 604, 82 L. Ed. 1043; *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, 83 L. Ed. 273.

Measured by These Standards the Tax Here is Clearly Valid.

1. Purchasers from foreign vendors are required to pay the same tax as purchasers from local vendors and no more. Foreign vendors are placed under the same general obligations with respect to collecting the tax as local vendors.

Foreign products are not discriminated against. On the other hand, local vendors, local products, and local businesses are discriminated against if retail sales can be made by retailers doing business within the State by a system of mail order transactions from a point outside the State.

2. There is no possibility of multiple taxation for if the Iowa purchaser pays a sales tax in any other State, exemption from use tax is given by virtue of Section 26 of the Use Tax Law, being Code Section 6943.125, Appendix "B". The tax is not on the gross receipts of a vendor imposed by the vendor's State, rather on the purchase of a local consumer. The tax is upon the acquisition of property in the local market.

With respect to analogous taxes on consumers, the court has already held that the State in which the consumer is may tax him. Thus it has sustained the following consumers' taxes imposed by the buyer's State, viz: A motor fuel sales tax sustained in *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169, — L. Ed. —; *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 78 L. Ed. 1141.

Other comparable sales taxes have been upheld by the Supreme Court of the United States. *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62, 83 L. Ed. 488, 59 S. Ct. 376; *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, 60 Supreme Court, 404, 84 L. Ed. Ad. Op. 360 *McGoldrick* v. *A. H. DuGrenier Inc.*, 309 U. S. 70, 60 S. Ct. 404, 84 L. Ed. Ad. Op. 219; *Jagels "Fuel Corporation"* v. *Taylor*, 60 S. Ct. 469, 280 N. Y. 766, 21 N. E. (2) 526.

In the *Jagels* case above the opinion in the New York Court of Appeals, which was sustained in the per curiam opinion in the Supreme Court of the United States, it shows that the third sales transaction, which was held subject to the New York sales tax act, involved a pure mail order business. The controversy in that case arose under the question concerning three classes of sales and the applicability

of the New York sales tax thereto. The third class is described as follows:

> "Written orders sent by the customer in New York to the New Jersey office followed by the delivery of a New Jersey yard to the customer in New York. In all three classes the customer is billed from the New Jersey office and payment is made to that office."

The tax on this sales transaction was upheld. Clearly this was a mail order transaction similar to the mail order transactions here involved.

Summary of Argument.

1.

The Iowa Sales Tax Law and the Iowa Use Tax Law present a plan for taxing all retail purchases in Iowa.

2.

The collection and payment provisions of the Iowa Use Tax Law as applied to the Corporations' Mail Order Businesses do not amount to extraterritorial operation of the law within the prohibition of the 14th Amendment to the Constitution of the United States.

3.

The collection and payment provisions of the Iowa Use Tax Law as applied to Corporations' Mail Order Businesses do not impose an unconstitutional burden on interstate commerce.

Respectfully submitted,

JOHN M. RANKIN,
Attorney General of the State of Iowa;
JOHN E. MULRONEY,
Assistant Attorney General of the State of Iowa,
Counsel for Petitioners.

State of Iowa

Retail Sales Tax Act of 1937

As Amended By

ACTS OF THE

FORTY-EIGHTH GENERAL ASSEMBLY

ORIGINAL ACT

Effective by Publication

April 1, 1937

NOTE: See footnotes on pages three and five for effective dates of amendments.

Revised and Issued By

IOWA STATE TAX COMMISSION

C. F. Garner, *Chairman*

D. L. Mumaw, *Vice Chairman*

Fred W. Nelson, *Member*

FOREWORD

This pamphlet is for use of taxpayers generally. It has been prepared for that purpose only. It contains only a portion of the Retail Sales Tax Act. Those parts of the Retail Sales Tax Act of 1937 that are not of interest to the general public are omitted herefrom. The language of the original Act is employed as far as practicable. All references to code sections contained in this revised copy of the Retail Sales Tax Act are to the Iowa Code of 1939.

AN ACT

To impose a tax on the gross receipts from retail sales as defined herein; to provide for the collection of such taxes and the administration of said act; to fix fines and penalties for the violation of the provisions of this Act; to provide for the appropriation of the revenues derived from said taxes; to appropriate funds for the administration of this Act; and to repeal all laws or parts of laws in conflict herewith.

Be It Enacted by the General Assembly of the State of Iowa:

Section 1. (Code 1939 Sec. 6943.074.) Definitions. The following words, terms, and phrases, when used in this Act, have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

a. "Person" includes any individual, firm, copartnership, joint adventure, association, corporation, municipal corporation, estate, trust, business trust, receiver, or any other group or combination acting as a unit and the plural as well as the singular number.

b. "Sales" means any transfer, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration.

c. "Retail sale" or "sale at retail" means the sale to a consumer or to any person for any purpose other than for processing or for resale of tangible personal property and the sale of gas, electricity, water, and communication service to retail consumers or users, but does not include commercial fertilizer or agricultural limestone, or electricity or steam when purchased and used in the processing of tangible personal property intended to be sold ultimately at retail.* Tangible personal property is sold for processing within the meaning of this subsection only when it is intended that such property shall by means of fabrication, compounding, manufacturing, or germination become an integral part of other tangible personal property intended to be sold ultimately at retail, or shall be consumed as fuel in creating heat, power or steam for processing or for generating electric current.

d. "Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect.

e. "Retailer" includes every person engaged in the business of selling tangible goods, wares, or merchandise at retail, or the furnishing of gas, electricity, water and communication service, and tickets or admissions to places of amusement and athletic events as provided in this Act; provided, however, that when in the opinion of the commission it is necessary for the efficient administration of this Act to regard any salesmen, representatives, truckers, peddlers or canvassers, as agents of the dealers, distributors, supervisors, employers, or persons under whom they operate or from whom they obtain tangible personal property sold by them irrespective of whether or not they are making sales on their

*NOTE: Amendment in italics effective March 30, 1939.

own behalf or for the owner or owners, dealers, distributors, supervisors, employers, or persons, the commission may so regard them, and may regard such dealers, distributors, supervisors, employers, or persons as retailers for the purposes of this Act.

f. "Gross receipts" means the total amount of the sales of retailers, valued in money, whether received in money or otherwise, provided, however, that discounts for any purpose allowed and taken on sales shall not be included, nor shall the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit. Provided further, that on all sales of retailers, valued in money, when such sales are made under conditional sales contract, or under other forms of sale wherein the payment of the principal sum thereunder be extended over a period longer than sixty days from the date of sale thereof that only such portion of the sale amount thereof shall be accounted, for the purpose of imposition of tax imposed by this Act, as has actually been received in cash by the retailer during such quarterly period as defined herein.

g. "Relief agency" means the state, any county, city and county, city or district thereof, or any agency engaged in actual relief work.

h. The word "commission" means the Iowa State Tax Commission.

i. The word "taxpayer" includes any person within the meaning of subsection "e" hereof, who is subject to a tax imposed by this Act, whether acting for himself or as a fiduciary.

Sec. 2. (Code Sec. 6943.075.) Tax Imposed. There is hereby imposed, beginning the first day of April, 1937, a tax of two percent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this Act, sold at retail in the state to consumers or users; a like rate of tax upon the gross receipts from the sales, furnishing or service of gas, electricity, water and communication service, including the gross receipts from such sales by any municipal corporation furnishing gas, electricity, water and communication service to the public in its proprietary capacity, except as otherwise provided in this Act, when sold at retail in the state to consumers or users; and a like rate of tax upon the gross receipts from all sales of tickets or admissions to places of amusement and athletic events, except as otherwise provided in this Act.

The tax herein levied shall be computed and collected as hereinafter provided.

Sec. 3. (Code Sec. 6943.076.) Exemptions. There are hereby specifically exempted from the provisions of this Act and from the computation of the amount of tax imposed by it, the following:

a. The gross receipts from sales of tangible personal property which this state is prohibited from taxing under the constitution or laws of the United States or under the constitution of this state.

b. The gross receipts from the sales, furnishing or service of transportation service.

c. The gross receipts from sales of tangible personal property used for the performance of a contract on public works executed prior to the ninth day of March, 1934.

d. The gross receipts from sales of tickets or admissions to state, county, district and local fairs,

Sec. 6. (Code Sec. 6943.077.) Credit on Tax. A credit shall be allowed against the amount of tax computed to be due and payable on the gross receipts from sales at retail of any tangible personal property upon which the state now imposes a special tax, whether in the form of a license tax, stamp tax, or otherwise, to the extent of the amount of such tax imposed and paid. Taxes paid on gross receipts represented by accounts found to be worthless and actually charged off for income tax purposes may be credited upon a subsequent payment of the tax herein provided; provided, that if such accounts are thereafter collected by the retailer, a tax shall be paid upon the amount so collected.

Sec. 7. (Code Sec. 6943.078.) Credit to Relief Agency.

1. A relief agency may apply to the commission for refund of the amount of tax imposed hereunder and paid upon sales to it of any goods, wares, or merchandise used for free distribution to the poor and needy.

2. Such refunds may be obtained only in the following amounts and manner and only under the following conditions:

a. On forms furnished by the commission, and filed within such time as the commission shall provide by regulation, the relief agency shall report to the commission the total amount or amounts, valued in money, expended directly or indirectly for goods, wares, or merchandise used for free distribution to the poor and needy.

b. On these forms the relief agency shall separately list the persons making the sales to it or to its order, together with the dates of the sales, and the total amount so expended by the relief agency.

c. The relief agency must prove to the satisfaction of the commission that the person making the sales has included the amount thereof in the computation of the gross receipts of such person and that such person has paid the tax levied by this Act, based upon such computation of gross receipts.

3. If the commission is satisfied that the foregoing conditions and requirements have been complied with, it shall refund the amount claimed by the relief agency.

Sec. 8. (Code Sec. 6943.079.) Adding of Tax. Retailers shall, as far as practicable, add the tax imposed under this Act, or the average equivalent thereof, to the sales price or charge and when added such tax shall constitute a part of such price or

*NOTE: Amendment in Italics effective April 21, 1933.

Sec. 7. (Code 6043.080.) Unlawful Acts. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the customer, or if added, that it or any part thereof will be refunded.

Sec. 8. (Code Sec. 6043.081.) Records Required. It shall be the duty of every retailer required to make a report and pay any tax under this Act, to preserve such records of the gross proceeds as shall be as the commission may require and it shall be the duty of every retailer to preserve for a period of five years all invoices and other records of goods, wares, or merchandise purchased for resale; and all such books, invoices, and other records shall be open to examination at any time by the commission or any one of its duly authorized agents, and shall be made available within this state for such examination upon reasonable notice when the commission shall deem it advisable and shall so order.

Sec. 9. (Code Sec. 6043.082.) Return of Gross Receipts.

1. The retailer shall, on or before the twentieth day of the month following the close of the first quarterly period as defined in section 6043.069, and on or before the twentieth day of the month following each subsequent quarterly period of three months, make out a return for the preceding quarterly period in such form and manner as may be prescribed by the commission, showing the gross receipts of the retailer, the amount of the tax for the period covered by such return, and such further information as the commission may require to enable it correctly to compute and collect the tax herein levied; provided, however, that the commission may, upon request by any retailer and a proper showing of the necessity therefor, grant unto such retailer an extension of time not to exceed thirty days for making such return. If such extension is granted to any such retailer, the time in which he is required to make payment as provided in section 6043.083 shall be extended for the same period.

[redacted]

thereof; in the case of a corporation, by an executive officer thereof or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority.

2. At the time of making such application, the applicant shall pay to the commission a permit fee of fifty cents for each permit, and the applicant must have a permit for each place of business.

3. Upon the payment of the permit fee or fees herein required, the commission shall grant and issue to each applicant a permit for each place of business within the state. A permit is not assignable and shall be valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. It shall at all times be conspicuously displayed at the place for which issued.

4. Permits issued under the provisions of this Act shall be valid and effective without further payment of fees until revoked by the commission.

5. Whenever the holder of a permit fails to comply with any of the provisions of this Act or any orders, rules or regulations of the commission prescribed and adopted under this Act, the commission upon hearing after giving ten days' notice of the time and place of the hearing to show cause why his permit should not be revoked, may revoke the permit. The commission shall also have the power to restore licenses after such revocation.

6. The commission shall charge a fee of one dollar for the issuance of a permit to a retailer whose permit has been previously revoked.

Sec. 12. (Code Sec. 6943.085.) Failure to File Return—Incorrect Return. If a return required by this Act is not filed, or if a return when filed is incorrect or insufficient and the maker fails to file a corrected or sufficient return within twenty days after the same is required by notice from the commission, such commission shall determine the amount of tax due from such information as it may be able to obtain and, if necessary, may estimate the tax on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and/or other factors. The commission shall give notice of such determination to the person liable for the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within thirty days after the giving of notice of such determination, apply to the commission for a hearing or unless the commission of its own motion shall reduce the same. At such hearing evidence may be offered to support such determination or prove that it is incorrect. After such hearing the commission shall give notice of its decision to the person liable for the tax.

Sec. 13. (Code Sec. 6943.086.) Appeals.

1. An appeal may be taken by the taxpayer to the district court of the county in which he resides, or in which his principal place of business is located, within sixty days after he shall have received notice from the commission of its determination as provided for in Section 6943.085.

2. The appeal shall be taken by a written notice to the chairman of the commission and served as an original notice. When said notice is so served it shall, with the return thereon, be filed in the

office of the clerk of said district court, and docketed as other cases, with the taxpayer as plaintiff and the commission as defendant. The plaintiff shall file with such clerk a bond for the use of the defendant, with sureties approved by such clerk, in penalty at least double the amount of tax appealed from, and in no case shall the bond be less than fifty dollars, conditioned that the plaintiff shall perform the orders of the court.

2. The court shall hear the appeal in equity and determine anew all questions submitted to it on appeal from the determination of the commission. In such appeal, the burden of proof shall be upon the taxpayer. The court shall render its decree thereon and a certified copy of said decree shall be filed by the clerk of said court with the commission who shall then correct the assessment in accordance with said decree. An appeal may be taken by the taxpayer or the commission to the supreme court of this state in the same manner that appeals are taken in suits in equity, irrespective of the amount involved.

Sec. 14. (Code Sec. 6943.097.) Statute Applicable to Sales Tax. All the provisions of Section 6943.053 of the 1939 Code of Iowa, shall apply in respect to the taxes and/or penalties imposed by this Act; excepting that, as applied to any tax imposed by this Act, the lien therein provided shall be prior and paramount over all subsequent liens upon any personal property within this state, or right to such personal property, belonging to the taxpayer without the necessity of recording as therein provided. The requirements for recording shall, as applied to the tax imposed by this Act, apply only to the liens upon real property. When requested to do so by any person from whom a taxpayer is seeking credit, or with whom the taxpayer is negotiating the sale of any personal property, or by any other person having a legitimate interest in such information, the commission shall, upon being satisfied that such a situation exists, inform such person as to the amount of unpaid taxes due by such taxpayer under the provisions of this Act. The giving of such information under such circumstances shall not be deemed a violation of Section 6943.036 as applied to this Act.

Sec. 15. (Code Sec. 6943.098.) Service of Notices.

1. Any notice, except notice of appeal, authorized or required under the provisions of this Act may be given by mailing the same to the person for whom it is intended by registered mail, addressed to such person at the address given in the last return filed by him pursuant to the provisions of this Act, or if no return has been filed, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this Act by the giving of notice shall commence to run from the date of registration and posting of such notice.

2. The provisions of the Code relative to the limitation of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty provided by this Act.

Sec. 16. (Code Sec. 6943.089.) Penalties—Offenses.

1. Any person failing to file a return or corrected return or to pay any tax within the time required by this Act, shall be subject to a penalty of five per cent of the amount of tax due, plus one per cent of such tax for each month of delay or fraction thereof, excepting the first month after such return was required to be filed or such tax became due; but the commission, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid to the commission and disposed of in the same manner as other receipts under this Act. Unpaid penalties may be enforced in the same manner as the tax imposed by this Act.

2. Any person who shall sell tangible personal property, tickets or admission to places of amusement and athletic events, or gas, water, electricity and communication service at retail in this state after his license shall have been revoked, or without procuring a license within sixty days after the effective date of this Act, as provided in Section 6943.084 of the Code, or who shall violate the provisions of Section 6943.090 of the Code, and the officers of any corporation who shall so act, shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment, in the discretion of the court.

3. Any person required to make, render, sign, or certify any return or supplementary return, who makes any false or fraudulent return with intent to defeat or evade the assessment required by law to be made, shall be guilty of a felony and shall, for each such offense, be fined not less than five hundred dollars and not more than five thousand dollars, or be imprisoned not exceeding one year, or be subject to both such fine and imprisonment, in the discretion of the court.

4. The certificate of the commission to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this Act, shall be prima facie evidence thereof.

Sec. 17. (Code Sec. 6943.090.) The commission and its employees shall administer the taxes imposed by this Act in the same manner and subject to all of the provisions of, and all of the powers, duties, authority, and restrictions contained in Sections 6943.091 to 6943.099 inclusive, Code, 1939, or any amendments which may hereafter be made thereto, all of which sections are by this reference incorporated herein.

State of Iowa

Personal Property Use Tax Act

S. F. 317
FORTY-SEVENTH GENERAL ASSEMBLY
As Amended By
ACTS OF THE
FORTY-EIGHTH GENERAL ASSEMBLY

Effective by Publication
April 16, 1937

NOTE: See footnote on page five for effective date of amendment.

Issued By
IOWA STATE TAX COMMISSION
C. F. Green, *Chairman*
D. L. Mumbow, *Vice Chairman*
Fred W. Nelson, *Member*

FOREWORD

This pamphlet is for use of taxpayers generally. It has been prepared for that purpose only. It contains only a portion of the Personal Property Use Tax Act. Those parts of the Personal Property Use Tax Act of 1937 that are not of interest to the general public are ommitted herefrom. The language of the original Act is employed as far as practicable. All references to code sections contained in this revised copy of the Personal Property Use Tax Act are to the Iowa Code of 1939.

AN ACT

To impose a tax on the use in this state of tangible personal property, as such terms are defined herein, including gas, electricity, and water; to provide certain exemptions therefrom; to provide for the collection of such tax and the administration of this Act; to fix interest, fines and penalties for the violation of the provisions of this Act; to provide for the disposition of the revenues derived from said tax; to appropriate funds for the administration of this Act; to exempt from the tax imposed by Senate File 316, Acts of the Forty-seventh General Assembly, (Div. IV., Chap. 329.3 Code, 1939) gross receipts from the sale of new motor vehicles and trailers; and to amend Section five thousand ninety-three-f twenty-nine (5093-f29), Code, 1935, relating to the refund of the motor vehicle fuel tax, to forbid such refund for fuel used in certain machinery for which the tax imposed by this Act or by Senate File 316, (Div. IV, Chap. 329.3 Code, 1939) Acts of the Forty-seventh General Assembly, has not been paid.

Be It Enacted by the General Assembly of the State of Iowa:

Section 1. (Sec. 6942.102 Code 1939.) The following words, terms and phrases when used in this act shall have the meanings ascribed to them in this section:

1. "Use" means and includes the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include processing, or the sale of that property in the regular course of business. Property used in "processing" within the meaning of this subsection shall mean and include (1) any tangible personal property including containers which it is intended shall, by means of fabrication, compounding, manufacturing, or germination, become an integral part of other tangible personal property intended to be sold ultimately at retail, (2) fuel which is consumed in creating power, heat or steam for processing or for generating electric current, (3) industrial materials and equipment, which are not readily obtainable in Iowa, and which are directly used in the actual fabricating, compounding, manufacturing or servicing of tangible personal property intended to be sold ultimately at retail.

2. "Purchase" means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration.

3. "Purchase price" means the total amount for which tangible personal property is sold, valued in money, whether paid in money or otherwise; provided that cash discounts allowed and taken on sales shall not be included.

4. "Tangible personal property" means tangible goods, wares, and merchandise, and gas, electricity, and water when furnished or delivered to consumers or users within this state.

5. "Retailer" means and includes every person engaged in the business of selling tangible personal property for use within the meaning of this act; provided, however, that when in the opinion of the commission it is necessary for the efficient admin-

istration of this act to regard any salesmen, representatives, truckers, peddlers or canvassers as the agents of the dealers, distributors, supervisors, employers or persons under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, employers, or persons, the commission may so regard them and may regard the dealers, distributors, supervisors, employers, or persons as retailers for purposes of this act.

6. "Retailer maintaining a place of business in this state" or any like term, shall mean and include any retailer having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent operating within this state under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent is located here permanently or temporarily, or whether such retailer or subsidiary is admitted to do business within this state pursuant to chapter three hundred eighty-six (386), code, 1939.

7. "Motor vehicle" shall mean every motor vehicle, as is now or may hereafter be so defined by the motor vehicle law of this state, which is required to be registered under such motor vehicle law.

8. "Person", "tax commission", and "taxpayer" shall have the same meaning as defined in section one of Senate File 316, acts of the Forty-seventh General Assembly. (Div. IV, Chap. 329.3 Code, 1939.)

9. "Trailer" shall mean every trailer, as is now or may be hereafter so defined by the motor vehicle law of this state, which is required to be registered under such motor vehicle law.

Sec. 2. (Code Sec. 6943.103.) An excise tax is hereby imposed on the use in this state of tangible personal property purchased on or after the effective date of this act (April 16, 1937) for use in this state, at the rate of two per cent of the purchase price of such property. Said tax is hereby imposed upon every person using such property within this state until such tax has been paid directly to the county treasurer, to a retailer, or to the commission as hereinafter provided.

Sec. 3. (Code Sec. 6943.104.) The use in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

1. Tangible personal property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Senate File 316, acts of the Forty-seventh General Assembly, (Code, Chap. 329.3, Div. IV, The Sales Tax Act) and any amendments made or which may hereafter be made thereto. This exemption does not include new motor vehicles as defined herein.

2. Tangible personal property used (a) in interstate transportation or interstate commerce, or (b) for the performance of a building or construction contract executed prior to the effective date of this act. (April 16, 1937.)

3. Tangible personal property upon which the state now imposes and collects a special tax, whether in the form of a license tax, stamp tax, or otherwise.

4. All articles of tangible personal property brought into the state of Iowa by a non-resident individual thereof for his or her use or enjoyment while within the state.

5. Tangible personal property not readily obtainable in Iowa and used in the operation of street railways.

6. Tangible personal property, the gross receipts from the sale of which are exempted from the retail sales tax by the terms of section three (3) of chapter one hundred ninety-six (196), Acts of the Forty-seventh General Assembly, as amended. (Code Sec. 6943.076.)*

Sec. 4. (Code Sec. 6943.105.) For the purpose of the proper administration of this act and to prevent evasion of the tax, evidence that tangible personal property was sold by any person for delivery in this state shall be prima facie evidence that such tangible personal property was sold for use in this state.

Sec. 5. (Code Sec. 6943.106.) The tax herein imposed shall be collected in the following manner:

1. The tax upon the use of all new motor vehicles and new trailers shall be collected by the county treasurer pursuant to the provisions of section six hereof. (Code Sec. 6943.107.)

2. The tax upon the use of all tangible personal property other than that enumerated in subsection one hereof, which is sold by a retailer maintaining a place of business in this state, or by such other retailer as the tax commission shall authorize pursuant to section nine, (Code Sec. 6943.110) shall be collected by such retailer and remitted to the state tax commission, pursuant to the provisions of sections eight to twelve inclusive. (Code Sec. 6943.109 to 6943.112 inclusive.)

3. The tax upon the use of all tangible personal property not paid pursuant to subsections one and two hereof shall be paid to the commission directly by any person using such property within this state, pursuant to the provisions of section thirteen hereof. (Code Sec. 6943.114.)

Sec. 6. (Code Sec. 6943.107.) The tax hereby imposed upon the use of new motor vehicles and new trailers shall be paid by the owner thereof to the county treasurer from whom the original certificate of registration for such motor vehicle or trailer is obtained. No original certificate of registration for any new motor vehicle or new trailer shall be issued until said tax has been so paid. The county treasurer shall require every applicant for an original certificate of registration for any new motor vehicle or new trailer to supply such information as he or the commission may deem necessary as to the time of purchase, the purchase price, and other information relative to the purchase of said motor vehicle or trailer. On or before the tenth day of each month the county treasurer shall remit to the commission the amount of the taxes so collected during the preceding month, together with an itemized statement on forms furnished by the commission showing the name of each taxpayer, the make and purchase price of each motor vehicle or trailer, the amount of tax paid in each case, and such other information as the commission shall require.

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*NOTE: Amendments in italics effective April 21, 1939.

Sec. 7. (Code Sec. 6943.108.) Motor vehicle or trailer dealers, in making their reports and returns to the commission for the purpose of paying the retail sales tax imposed by Senate File 316, acts of the Forty-seventh General Assembly, (Div. IV, chapter 329.3 Code, 1939) shall be permitted to deduct all gross receipts from retail sales of new motor vehicles and new trailers. Gross receipts from such new motor vehicle and new trailer sales are hereby expressly exempted from the tax imposed by Senate File 316, acts of the Forty-seventh General Assembly, (Div. IV, Chap. 329.3) but, if required by the commission, such gross receipts shall be included in the returns made by motor vehicle or trailer dealers under said act, and proper deductions taken pursuant to this section.

Sec. 8. (Code Sec. 6943.109.) Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state, not exempted under the provisions of section three hereof nor collectible under the provisions of section six hereof, shall at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the commission, if the commission shall, by regulation, require such receipt. Each such retailer shall list with the commission the name and address of all his agents operating in this state, and the location of any and all his distribution or sales houses or offices or other places of business in this state.

Sec. 9. (Code Sec. 6943.110.) The commission may, in its discretion, upon application authorize the collection of the tax hereby imposed by any retailer not maintaining a place of business within this state, who, to the satisfaction of the commission furnishes adequate security to insure collection and payment of the tax. Such retailer shall be issued, without charge, a permit to collect such tax in such manner, and subject to such regulations and agreements as the commission shall prescribe. When so authorized, it shall be the duty of such retailer to collect the tax upon all tangible personal property sold to his knowledge for use within this state, in the same manner and subject to the same requirements as a retailer maintaining a place of business within this state. Such authority and permit may be cancelled when, at any time, the commission considers the security inadequate, or that such tax can more effectively be collected from the person using such property in this state.

Sec. 10. (Code Sec. 6943.111.) It shall be unlawful for any retailer to advertise or hold out or state to the public or to any purchaser, consumer or user, directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. The commission shall have the power to adopt and promulgate rules and regulations for adding such tax, or the average equivalent thereof, by providing different methods applying uniformly to retailers within the same general classification for the purpose of enabling such retailers to add and collect, as far as practicable, the amount of such tax. Any person violating any of the provisions of this section within

this state shall be guilty of a misdemeanor and subject to the penalties provided in section nineteen hereof. (Code Sec. 6943.130.)

Sec. 11. (Code Sec. 6943.112.) The tax herein required to be collected by any retailer pursuant to sections eight (Code Sec. 6943.109) or nine (Code Sec. 6943.110) hereof, and any tax collected by any retailer pursuant to said sections, shall constitute a debt owed by the retailer to this state.

Sec. 12. (Code Sec. 6943.113.) Each retailer required or authorized, pursuant to sections eight (Code Sec. 6943.109) or nine (Code Sec. 6943.110) hereof, to collect the tax herein imposed, shall be required to pay to the commission the amount of such tax, on or before the twentieth day of the month next succeeding such quarterly period, the first such quarterly period being the period commencing on the first day of April, 1937, and ending on the thirtieth day of June, 1937. At such time, each such retailer shall file with the commission a return for the preceding quarterly period in such form as may be prescribed by the commission showing the sales price of any or all tangible personal property sold by the retailer during such preceding quarterly period, the use of which is subject to the tax imposed by this act, and such other information as the commission may deem necessary for the proper administration of this act. The return shall be accompanied by a remittance of the amount of such tax, for the period covered by the return, provided that where such tangible personal property is sold under a conditional sales contract, or under any other form of sale wherein the payment of the principal sum, or a part thereof, is extended over a period longer than sixty days from the date of the sale thereof, the retailer may collect and remit each quarterly period that portion of the tax equal to two per cent of that portion of the purchase price actually received during such quarterly period.

The commission, if it deems it necessary in order to insure payment to the state of the amount of such tax, may in any or all cases require returns and payments of such amount to be made for other than quarterly periods. The commission may upon request and a proper showing of the necessity therefor, grant an extension of time not to exceed thirty days for making any return and payment. Returns shall be signed by the retailer or his duly authorized agent, and must be certified by him to be correct.

Sec. 13. (Code Sec. 6943.114.) Any person who uses any property upon which the tax herein imposed has not been paid, either to the county treasurer or to a retailer or direct to the commission as herein provided, shall be liable therefor, and shall on or before the twentieth day of the month next succeeding each quarterly period pay the tax herein imposed upon all such property used by him during the preceding quarterly period in such manner and accompanied by such returns as the commission shall prescribe. All of the provisions of section twelve (Code Sec. 6943.113) with reference to such returns and payments shall be applicable to the returns and payments herein required.

Sec 14. (Code Sec. 6943.115.) The commission may, when in its judgment it is necessary and advisable to do so in order to secure the collection of the tax

levied under this act, authorize any person subject to such tax, and any retailer required or authorized to collect such tax pursuant to the provisions of sections eight (Code Sec. 6943.109) and nine (Code Sec. 6943.110) hereof, to file with it a bond, issued by a surety company authorized to transact business in this state and approved by the insurance commissioner as to solvency and responsibility, in such amount as the commission may fix, to secure the payment of any tax, amount, and/or penalties due or which may become due from such person. In lieu of such bond, securities approved by the commission, in such amount as it may prescribe, may be deposited with it, which securities shall be kept in the custody of the commission and may be sold by it at public or private sale, without notice to the depositor thereof, if it becomes necessary to do so in order to recover any tax and/or penalties due. Upon any such sale, the surplus, if any, above the amounts due under this act shall be returned to the person who deposited the securities.

Sec. 15. (Code Sec. 6943.116.) If any return required by this act is not filed, or if any return when filed is incorrect or insufficient, and the maker or person from whom it is due fails to file a corrected or sufficient return within twenty days after the same is required by notice from the commission, the commission shall have the same power to determine the amount due, as is vested in the commission by sections twelve (12) (Code Sec. 6943.085), thirteen (13) (Code Sec. 6943.086), and fifteen (15) (Code Sec. 6943.088), of Senate File 316, acts of the Forty-seventh General Assembly, subject to all of the provisions, and restrictions, and rights of appeal provided in said sections.

Sec. 16. (Code Sec. 6943.117.) All of the provisions of sections fourteen (14) (Code Sec. 6943.087) and fifteen (15) (Code Sec. 6943.088) of Senate File 316, acts of the Forty-seventh General Assembly (Chap. 329.2 Code, 1939) shall apply in respect to the procedure, taxes, amounts required to be paid, and/or penalties imposed, as provided by this act.

Sec. 17. (Code Sec. 6943.118.) Any person failing to file a return or corrected return or to pay any tax and/or amount required to be paid by this act within the time required by this act, shall be subject to a penalty of five percent of the amount due, plus one percent of such amount for each month of delay or fraction thereof, excepting the first month after such return was required to be filed or such tax or amount became due; but the commission, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid to the commission and disposed of in the same manner as other receipts under this act. Unpaid penalties may be enforced in the same manner as the tax imposed by this act. The certificate of the commission to the effect that a tax and/or amount required to be paid by this act has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this act, shall be prima facie evidence thereof.

Sec. 18. (Code Sec. 6943.119.) Any person required to make, render, sign or certify any return or supplementary return, who makes any false or fraudu-

last return with intent to defeat or evade the tax and/or amount required to be paid by this act, shall be guilty of a felony and shall, for each such offense, be fined not less than five hundred ($500) dollars and not more than five thousand ($5,000) dollars, or be imprisoned not exceeding one year, or be subject to both such fine and imprisonment, in the discretion of the court.

Sec. 19. (Code Sec. 6943.120.) Any retailer or other person failing or refusing to furnish any return herein required to be made, or failing or refusing to furnish a supplemental return or other data required by the commission, shall be guilty of a misdemeanor and subject to a fine of not to exceed one hundred (100) dollars for each such offense, or to imprisonment for not to exceed thirty days, or to both such fine and imprisonment, in the discretion of the court.

Sec. 20. (Code Sec. 6943.121.) Every retailer required or authorized to collect taxes imposed by this act and every person using in this state tangible personal property purchased on or after April 1, 1937, shall keep such records, receipts, invoices, and other pertinent papers as the commission shall require, in such form as the commission shall require. The commission or any of its duly authorized agents is hereby authorized to examine the books, papers, records and equipment of any person either selling tangible personal property or liable for the tax imposed by this act, and to investigate the character of the business of any such person in order to verify the accuracy of any return made, or if no return was made by such person, to ascertain and determine the amount due under the provisions of this act. Any such books, papers, and records shall be made available within this state for such examination upon reasonable notice when the commission shall deem it advisable and shall so order.

Sec. 21. (Code Sec. 6943.122.) Whenever any retailer maintaining a place of business in this state, or authorized to collect the tax herein imposed pursuant to section nine (Code Sec. 6943.110) hereof, fails to comply with any of the provisions of this act or any orders, rules, or regulations of the commission prescribed and adopted under this act, the commission may, upon notice and hearing as hereinafter provided, by order revoke the permit, if any, issued to such retailer under section eleven (11) of Senate File 316, acts of the Forty-seventh General Assembly (Code Sec. 6943.084), or if such retailer is a corporation authorized to do business in this state under chapter three hundred eighty-six (386), code, 1939, may certify to the secretary of state a copy of an order finding that such retailer has failed to comply with certain specified provisions, orders, rules or regulations. The secretary of state shall, upon receipt of such certified copy, revoke the permit authorizing said corporation to do business in this state, and shall issue a new permit only when such corporation shall have obtained from the commission an order finding that such corporation has complied with its obligations under this act. No order authorized in this section shall be made until the retailer is given an opportunity to be heard and to show cause why such order should not be made, and he shall be given ten days notice of the time, place, and purpose of such hearing. The commission shall

have the power in its discretion to issue a new permit pursuant to section eleven of Senate File 316, acts of the Forty-seventh General Assembly (Code Sec. 6942.064), after such revocation.

Sec. 22. (Code Sec. 6942.123.) The commission is hereby charged with the enforcement of the provisions of this act, and the commission and its employees shall administer this act and the taxes imposed by this act in the same manner and subject to all of the provisions of, and all of the powers, duties, authority, and restrictions contained in sections 6943.091 to 6943.099, inclusive, code, 1939, or any amendments which may hereafter be made thereto, all of which sections are by this reference incorporated herein.

Sec. 23. (Code Sec. 6942.124.) All revenues arising under the operation of this act, less cost of collection and administration, shall be paid into the general fund of the state of Iowa.

If the gross receipts from or the use of any stationary engine, tractor, boat, aircraft, or other type of power driven machinery constituting with the engine one unit, are subject to the tax imposed by Senate File 316 (Chapter 329.3, Code, 1939), or Senate File 317 (Chapter 329.4, Code, 1939), acts of the Forty-seventh General Assembly, no refund for motor vehicle fuel used in operating or propelling such machinery shall be made until the person claiming such refund has established to the satisfaction of the treasurer that such tax for such machinery has been paid.

Sec. 24. (Code Sec. 6942.125.) If any article of tangible personal property has already been subjected to a tax by any other state in respect to its sale or use in an amount less than the tax imposed by this title, the provisions of this title shall apply, but at a rate measured by the difference only between the rate herein fixed and the rate by which the previous tax upon the sale or use was computed. If such tax imposed in such other state is two per cent (2%) or more, then no tax shall be due on such articles.

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 255.

LOUIS E. RODDEWIG, as Chairman of the Iowa State Board of Assessment and Review, and Individually; D. L. MURROW and C. FRANK GREEN, as Members of the Iowa State Board of Assessment and Review, and Individually,

Petitioners,

vs.

SEARS, ROEBUCK AND CO.

No. 256.

LOUIS E. RODDEWIG, as Chairman of the Iowa State Board of Assessment and Review, and Individually; D. L. MURROW and C. FRANK GREEN, as Members of the Iowa State Board of Assessment and Review, and Individually,

Petitioners,

vs.

MONTGOMERY WARD AND CO., INCORPORATED.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF FOR PETITIONER.

JOHN M. RANKIN,
Attorney General of the State of Iowa,
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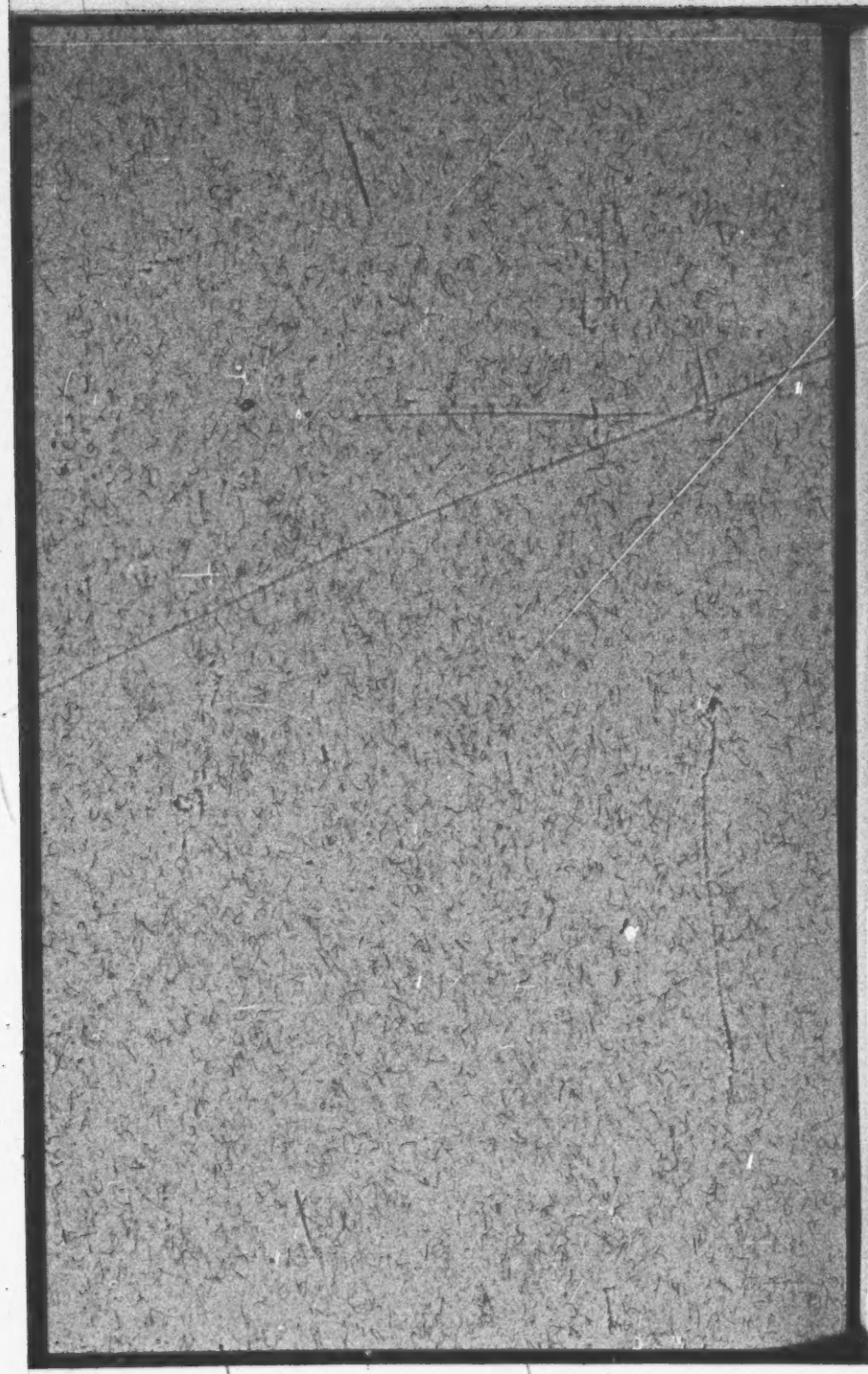
Assistant Attorney General,
Counsel for Petitioners.



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Supreme Court of the United States

OCTOBER TERM, 1940.

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Petitioners,

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Petitioners,

vs.

MONTGOMERY WARD AND CO., INCORPORATED.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF FOR PETITIONER.

PRELIMINARY STATEMENT.

This case and the companion case of Louis E. Roddewig, et al. v. Montgomery Ward & Company, No. 256 of this Court involve identical questions of law. Since our argument here is confined to the mail order transactions, the

cases involve identical questions of fact. The two cases were not consolidated for trial in the District Court of Polk County, Iowa but that Court rendered identical opinions and decrees and the cases were orally argued together in the Supreme Court of Iowa. It will be noted the opinion in the Supreme Court of Iowa in the Sears, Roebuck case is the controlling opinion and the two cases were the subject of one Petition for Writs of Certiorari in this Court. Because of this, we are filing identical briefs in this case and the Montgomery Ward case, Nos. 255 and 256 in this Court. Separate records have been filed and we will continue our plan of record references which was adopted in our Petition for Writs of Certiorari, namely, designating record references in the Sears, Roebuck case as "R. S." and record references in the Montgomery Ward case as "R. M."

OPINIONS OF THE COURT BELOW.

The opinion of the Iowa Supreme Court in the Sears, Roebuck case (No. 255 in this Court) is the controlling opinion and it is reported in 292 N. W. 130 and is found in the record R. S. 88.

The opinion of the Iowa Supreme Court in the Montgomery Ward case (No. 256 in this Court) is reported in 292 N. W. 142 and is found in the record R. M. 101.

STATEMENT AS TO JURISDICTION.

This case comes here under a writ of certiorari granted ~~September~~ 14, 1940 by this Court to review the final judgment of the Supreme Court of the State of Iowa, the highest Court of that State, holding that the collection and payment provisions of the Iowa Use Tax Law as applied to the respondent's mail order business amounted to extraterritorial operation of the Iowa laws within the prohibition of the Fourteenth Amendment to the Constitution of the United

States, and also holding that such provision of the Iowa Use Tax Law, when applied to the respondent's mail order business, imposed an unconstitutional burden upon interstate commerce. The extraterritorial operation of the statute was discussed at length in the opinion of the Supreme Court of the State of Iowa while but slight reference is made to the holding of the trial Court that the provisions of the Iowa Use Tax Law constitute a burden on interstate commerce. (See Iowa Supreme Court opinion, 292 130). This brings the case within the provisions of the Judicial Code, Section 237(b), as amended, 28 U. S. Code Ann., Section 344(b).

STATEMENT OF THE CASE.

The respondent is a non-resident corporation licensed to do business in the State of Iowa. Pursuant to such license it has established and is now conducting various retail stores in Iowa. In addition to the business conducted in Iowa, this corporation conducts a mail order business through mail order stores or establishments located outside of Iowa. From time to time mail order catalogs are sent to prospective customers in Iowa and the Iowa customers send orders by mail to such mail order stores located outside of Iowa and the orders are there filled and the merchandise shipped to the purchasers in Iowa.

The Iowa Use Tax Act (Appendix B) provides that every retailer maintaining a place of business in the State and making sales of tangible personal property for use in the State shall at the time of the making of the sale, whether within or without the State, collect 2% use tax from the purchaser. Other provisions of the Act provide that the tax shall constitute a debt owed by the retailer to the State and further that whenever the retailer maintaining a place of business in the State is a corporation authorized to do business in Iowa and fails to comply with the provisions of

the Iowa Use Tax Act, then the retailer's license and the permit authorizing the corporation to do business in the State of Iowa may be revoked.

The respondent, hereafter called the corporation, has not collected or paid a use tax on such mail order sales to the Iowa residents. The State Tax Commission adopted a resolution threatening to revoke the corporation's retailers license and permit to do business in Iowa for failure to collect and pay the use tax on mail order sales of tangible personal property to the residents of Iowa.

The corporation sought an injunction restraining the Commission from taking any action to secure the revocation of its retailers license or permit to do business in Iowa. The Polk County Iowa District Court granted the injunction holding the Iowa Use Tax Law, insofar as it purports to authorize the Commission to insist upon the corporation collecting the tax on mail order sales made to persons in Iowa through mail order establishments located outside of Iowa, is unconstitutional, being contrary to Section 8 Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment thereto.

Upon appeal to the Supreme Court of Iowa the decisions of the lower Court were affirmed (the Chief Justice and three other Justices dissenting) upon the same ground, viz.; the Iowa Use Tax Law, insofar as it purports to compel the corporation to collect the 2% tax from Iowa purchasers in mail order transactions under penalty of revocation of the corporation's retailers license and permit to do business in Iowa, is in violation of Section 8 of Article I of the United States Constitution, an i Section 1 of the Fourteenth Amendment thereto.

SPECIFICATION OF ERRORS TO BE URGED.

It is submitted that the Supreme Court of Iowa erred in holding:

(a) That the collection and payment provisions of the Iowa Use Tax Law as applied to the corporation's mail order business amounted to extraterritorial operation of the Iowa laws within the prohibition of the 14th Amendment to the Constitution of the United States;

(b) That the collection and payment provisions of the Iowa Use Tax Laws as applied to the corporation's mail order business imposed a tax upon its activities outside of the State within the prohibition of the 14th Amendment to the Constitution of the United States;

(c) That the collection and payment provisions of the Iowa Use Tax Law as applied to the corporation's mail order business imposed an unconstitutional burden on interstate commerce;

(d) In regarding itself as compelled by Section 8 Article I of the Constitution of the United States and Section 1 of the 14th Amendment thereto to affirm the ruling of the Polk County District Court restraining the Commission from taking steps to cancel the permit and retail license of the corporation for failure to collect or pay the tax on mail order sales to Iowa residents.

SUMMARY OF ARGUMENT.

POINT I.

The Iowa Use Tax and the Iowa Sales Tax must be construed together to determine the constitutional validity.

Authorities on law:

Henneford v. Silas-Mason Co., 300 U. S. 577 (1937).

Gregg Dyeing Company v. Querry, 286 U. S. 472.

Southern Pacific Co. v. Andrew J. Gallagher, 306 U. S. 167 (1939).

POINT II.

The collection and payment provisions of the Iowa Use Tax Act as applied to the company's mail order business do not amount to extraterritorial operation of the Iowa law within the prohibition of the Fourteenth Amendment to the Constitution of the United States.

(a) The requirement that the retailer act as agent of the State in collecting the tax from its customers is not an attempt on the part of the State to enforce its laws extraterritorially.

Authorities on law:

Henneford v. Silas Mason Company, 300 U. S. 577.

Monamotor Oil Co. v. Johnson, 292 U. S. 86.

Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62 (1939).

(b) The Use Tax is conditioned upon an event occurring within the State of Iowa, namely, Use, and it is immaterial if the order was the result of personal solicitation, or the approval of the order an extrastate activity.

McGoldrick v. Berwind White Coal Mining Co., 309 U. S. 33 (1940).

Jagels, "a fuel corporation" v. Taylor, 60 S. Ct. 469.

McGoldrick v. A. H. DuGrenier, Inc., 309 U. S. 70 (1940).

McGoldrick v. Felt & Tarrant Co., 309 U. S. 70 (1940).

(c) The power to impose the duty of collecting the tax upon the seller in consideration of the grant of privilege to the seller to engage in the retail business in Iowa is not prohibited by the due process clause of the constitution.

Authorities on law:

Ford Motor Co. v. Beauchamp, 308 U. S. 331.

Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 412.

Pierce Oil Company v. Hopkins, 264 U. S. 137.

Equitable Assurance Society v. Pennsylvania, 288 U. S. 143.

General De Tabocos v. Collector of Revenue, 275 U. S. 98.

(d) If intrastate activity in connection with the sale for use in Iowa be thought necessary, then such activity is present in this case.

Authorities on law:

Sears, Roebuck v. Roddewig, 292 N. W. 130 (Dissenting opinion of Justice Hamilton).

POINT III.

The collection and payment provisions of the Iowa Use Tax Law as applied to the corporation's mail order business imposed no unconstitutional burden on interstate commerce.

Authorities on law:

McCarroll v. Dixie Greyhound Lines, 60 S. Ct. 504.

Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62.

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940).

McGoldrick v. Felt & Tarrant Mfg. Co., 309 U. S. 70 (1940).

McGoldrick v. A. H. DuGrenier, Inc., 309 U. S. 70 (1940).

Jagels, "a fuel corporation" v. Taylor, 60 S. Ct. 469.

Wiloil Corporation v. Pennsylvania, 294 U. S. 169.

Monamotor Oil Co. v. Johnson, 292 U. S. 86.

Western Live Stock v. Bureau of Revenue, 303 U. S. 250.

Board of Equalization v. Blind Bull Co., 101 Pac. (2nd) 70, decided April 16, 1940 (Wyoming).

Hollis and Co. v. McCarroll, 140 S. W. (2nd) 420 (Ark.) May 6, 1940.

United Autographic Register Co. v. McGoldrick, 21 N. Y. Sup. 129, (New York S. C. Appellate Div. June 28, 1940).

POINT I.

The Iowa Use Tax and the Iowa Sales Tax must be construed together to determine the constitutional validity.

In considering the Iowa Use Tax Act we must of necessity call to the Court's attention the Iowa Sales Tax Act. The Iowa Sales Tax Act was first enacted into law in 1935. It was re-enacted by the 47th General Assembly of Iowa in 1937. (Appendix A). As will be observed from an examination of the Sales Tax Act, a tax of 2% is measured upon the gross receipts from all sales of tangible personal property sold at retail in the State to consumers or users. At the time the retail sales tax act was re-enacted in 1937, the same 47th General Assembly passed the Use Tax Act, which is Chapter 198 of the Acts of the 47th General Assembly. (Appendix B). It will be observed that this Use Tax Act provides for an imposition of an excise tax on the use in the State of Iowa of tangible personal property measured by 2% of the purchase price of said property. "Use" is defined by the Act as the exercise by any person of any right or power over tangible personal property incident to ownership of that property. The Use Tax Act applies only to the use of tangible personal property brought into the State of Iowa, the gross receipts from the sale of which were not subject to the Iowa Sales Tax Act or the sales or Use Tax Act of any other State. Together these

two Acts form a single complete plan of taxation and impose a uniform tax measured by 2% of the purchase price upon all goods used in the State of Iowa with the exceptions noted in the Acts.

For the purpose of preventing evasion and to assist in the proper administration of the Act, evidence that tangible personal property was sold and delivered in this State is *prima facie* evidence that such personal property was sold for use in this State, and any one making sales of tangible personal property for use in this State not exempted under the provisions of the Act, is required to collect the tax imposed by the Use Tax Act from the purchaser. The Sales Tax Act contains similar provisions requiring the seller to collect the 2% sales tax from the purchaser.

This plan of taxation is identical with the plan employed by the State of Washington in connection with its sales tax and compensating tax. In the case of *Henneford v. Silas-Mason Co.*, 300 U. S. 577, (1937) the Washington Compensating Tax Act was attacked. The United States Supreme Court took into consideration the complementary features of the Act and approved the system employed.

In the case of *Gregg Dyeing Company v. Querry*, 286 U. S. 472, the South Carolina statute imposing a tax on the storage for use of gasoline was under attack. Another statute imposed a tax upon gasoline sold in South Carolina and in answer to the argument that the first statute must be considered by itself, this Court stated:

> "The state court answered the contention as to discrimination against interstate commerce by referring to other statutes of the State imposing a tax upon the sale and use of gasoline within the State. The State Court said that the Act in question 'taxes all gasoline stored for use and consumption upon which a like tax has not been paid under other statutes. By the kindred Acts all users are taxed.' But appellants question the right to invoke other statutes to support the validity of the

> Act assailed. To stand the test of constitutionality, they say, the Act must be constitutional 'within its four corners,' that is, considered by itself. This argument is without merit. The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power."

The Iowa plan of taxation is also similar to the California plan of sales and use tax. In the case of *Southern Pacific Co. v. Andrew J. Gallagher*, 306 U. S. 167 (1939) this Court in considering a use tax question stated:

> "The Use Tax Act is complemental to the California Retail Sales Tax Act of 1933. The latter levies a tax upon the gross receipts of California retailers from sales of tangible personal property; the former imposes an excise on the consumer at the same rate for the storage, use or other consumption in the state of such property when purchased from any retailer. As property covered by the sales tax is exempt under the use tax, all tangible personalty sold or utilized in California is taxed once for the support of the state government."

Taking the sales tax and use tax together, and we submit they can be taken together for the purpose of consideration of the issues involved in this case, the two statutes present a plan for taxing all retail purchases of tangible personal property. The purpose of the use tax, to prevent the liklihood of a drain upon the revenues of the State where the sales tax is in force by placing orders outside the State, is readily apparent. The experience in Iowa after two years of a sales tax without a use tax prompted the Legislature, when re-enacting the Sales Tax Act to pass this complementary Use Tax Act. The sales tax without a use tax en-

couraged local buyers to place orders with sellers outside the State. The result sought to be obtained is quite apparent. By the passage of the Use Tax Act the local retailers are protected so that they can compete upon terms of equality with retailers of other states. We believe these two Acts must necessarily be considered together and this legislative purpose taken into consideration in determining the validity of this Act.

POINT II.

The collection and payment provisions of the Iowa Use Tax Act as applied to the company's mail order business do not amount to extraterritorial operation of the Iowa law within the prohibition of the Fourteenth Amendment to the Constitution of the United States.

(a) The requirement that the retailer act as agent of the State in collecting the tax from its customers is not an attempt on the part of the State to enforce its laws extraterritorially.

Perhaps the best argument in support of our position that the State of Iowa is not seeking to assert jurisdiction in regard to the Company's activities in another State and thereby give its law extraterritorial effect, is contained in the dissenting opinion of Chief Justice Hamilton in the case of *Sears, Roebuck & Co. v. Roddewig*, 202 N. W. 130, 137 to 140, and the dissenting opinion of Justice Mitchell in the same case at page 137.

Of course it will not be contended here that this use tax is unconstitutional. That such a use tax is a valid exercise of the taxing power of a State has long been upheld. In fact, in the case of *Henneford v. Silas Mason Company*, 300 U. S. 577, the Court in upholding the Washington Compensating Tax, which is similiar to our use tax, stated that

the right to so tax was no longer in the "arena of debate."

The controversy here centers around Section 8 of the Act where provision is made that every retailer maintaining a place of business in this State and making sales of tangible personal property for use in this State, whether such sales are made within or without the State, shall collect from the purchaser the tax imposed by this Act.

Precisely what is the nature of the duty thus cast upon the retailer? *It is simply this, that the retailer is designated and made the agent of the State of Iowa for the purpose of collecting from the source, to wit, the purchaser, the tax which the purchaser owes to the State of Iowa.* This is neither a new, strange, nor unusual duty; and the imposition of such a duty has met with the fullest approval of this Court. In the case of *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, Justice Roberts, in upholding the collection provisions of the Iowa Gasoline Tax Act, stated:

> "The appellant, however, says that the state officials have required it to report and to pay tax on shipments made from Oklahoma direct to dealers in Iowa who are appellant's customers, and that in respect of such transactions the burden on interstate commerce is obvious. But if the gasoline so imported is intended to be used in Iowa for motor vehicle fuel it is subject to the tax. If it is not so used by the appellant's customer, or by the purchaser at retail, either may obtain a refund of the tax collected by the appellant and remitted to the state. The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant."

We understand this argument of extraterritoriality arises in the prohibition contained in the Due Process Clause of

the Fourteenth Amendment to the Constitution which denies to the State the power to tax or regulate the corporation's property and activities elsewhere. In the *Monamotor Oil Company* case this same argument was advanced, for the appellant in that case complained that the State officials required it to report and to pay tax on shipments made direct from Oklahoma to dealers in Iowa. The Court stated:

> "The method of imposition and collection of the tax does not deny the equal protection of the laws guaranteed by the Fourteenth Amendment. * * * The short answer to the contention is that the statutes properly construed lay no tax whatever upon distributors but make of them mere collectors from users of motor vehicle fuel and refund the tax only to that class of users upon whom no excise is intended to be laid. The distributor does not pay the tax; the user does."

This same argument of extraterritorial operation of a State law was also advanced in the case of *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62 (1939). This is the case which Chief Justice Hamilton in his dissenting opinion discussed at length. In this case the Felt & Tarrant Company, an Illinois Corporation, sought to enjoin the State Tax Collector of California from collecting a tax similiar to our use tax where the sales of comptometers were made by the Felt & Tarrant Company by means of orders solicited by agents in the State of California. The orders were all subject to acceptance by the Illinois corporation at its home office in Chicago. The comptometers which the company sold were sometimes shipped direct to the purchasers, but sometimes the orders were filled from stocks of stored comptometers in the State of California. Counsel in that case did not question the right of the State to collect the use tax from the user, but as in this mail order case, counsel questioned the right of the State to compel the seller to serve as an agent for collecting the tax. The argument was made that

this would be a direct burden upon interstate commerce and also that:

> "Numerous provisions of the statute if applied would deprive appellant of its property without due process of law."

Thus the issue of extraterritoriality was present in that case, and this Court merely held:

> "The trial court thought that both contentions were foreclosed by what was said and ruled in *Bowman v. Continental Oil Co.*, 256 U. S. 642, 650, 41 St. Ct. 606, 609, 65 L. Ed. 1139 (1145), *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, 93, 95, 54 S. Ct. 575, 578, 78 L. Ed. 1141 (1147, 1148), and *Henneford v. Silas Mason Co.*, 300 U. S. 577, 582, 583, 57 S. Ct. 524, 526, 527, 81 L. Ed. 814 (818, 819). And we agree with that conclusion."

Counsel has argued that these two decisions, namely, the *Monamotor Oil Company* case and the *Felt & Tarrant v. Gallagher* case were based on the sole ground that there was in each case no violation of the commerce clause of the Constitution; that the argument of extraterritorial operation of the State laws was not presented or passed upon in either case. As we read these cases we find the decisions do give consideration to both the commerce clause and the due process clause of the Fourteenth Amendment. We think the exact contention of extraterritoriality was made in each case and decided against the sellers. So, too, did Justice Hamilton in his comments upon these cases in his dissenting opinion in the Sears, Roebuck case reported in 292 N. W. 130. In speaking of the *Felt & Tarrant* case in connection with counsel's argument that the extraterritoriality issue was not involved, Justice Hamilton at page 138 stated:

> "Appellee attempts to differentiate between the *Felt & Tarrant Mfg. Co.* case and the instant case and further contends that the issue of extraterritoriality involved in the instant case was not raised, argued or de-

cided in the California case. We disagree with counsel for appellee. Mr. Justice McReynolds, who has never been accused of being unable to clearly express himself, states the issues as follows: 'Appellant seeks an injunction prohibiting the state officers from enforcing against it the California Use Tax Act of 1935. Cal. Stat. 1935, ch. 361, p. 1297, as amended by Cal. Stat. 1937, chs. 401, 671 and 683, pp. 1327, 1874, 1936. Counsel do not question the right of the state to collect this tax from the user, etc., but they say that, in the circumstances here disclosed, the officers may not compel appellant *to serve as an agent for collecting the tax* as they are threatening to do.' (Italics ours.) This is exactly the contention which appellee, in the instant case, is now making."

Then follows a quotation from the *Felt & Tarrant* case, a part of which we have already made, and the additional comment:

"The foregoing, in substance, is the argument now made to this Court in the instant case."

Again in this same dissenting opinion on page 140 Justice Hamilton discussed this issue of extraterritoriality under the due process clause and with reference to the *Monamotor Oil Company* case stated:

"The same contention was made in the case of *Monamotor Oil Co. v. Johnson, supra,* and in disposing of this feature, Justice Roberts speaking for the Court, said:"

Then follows a quotation from the *Monamotor Oil Company* case which we have already made.

Of course counsel realizes that these two cases must be distinguished or the argument of extraterritoriality is foreclosed. The cases cannot be distinguished upon the facts so counsel is left with the argument that the lawyers in this case failed to raise this issue and consequently this Court did not pass on this phase of the case. In the light of the clear unequivocal statements in each case, we submit the is-

sue of extraterritoriality was raised and decided in these two decisions involving the California use tax and the Iowa gasoline tax.

(b) The Use Tax is conditioned upon an event occurring within the State of Iowa, namely, Use, and it is immaterial if the order was the result of personal solicitation or the approval of the order an extrastate activity.

Whenever argument has been made in this case, opposing counsel have always sought to distinguish such cases as the *Monamotor Oil Company* case and the *Felt & Tarrant Company* case by pointing out that in those cases the order placed by the customer was the result of personal solicitation or by pointing out, as in the case of *McGoldrick v. Berwind White Coal Mining Co.*, 309 U. S. 33 (1940), that the sale contract was completed in the State where the purchaser lived. Such arguments ignore the fundamental object of the Iowa Use Tax Act. The incident of the tax is the use of the property in the State of Iowa. From a practical standpoint, the place of making the agreement is unimportant and the use tax should be sustained regardless of the locale chosen by the parties at which to make this agreement of sale. It would seem that it should not make any difference whether the agreement of sale was made within or without the customer's State. In no case has this Court upheld such a tax on the ground that the sale contract was either solicited or consummated within the borders of the purchaser's State.

In the *Monamotor Oil Company* case the Court upheld the Iowa gasoline tax with its provisions for collection by the seller in the situations where the gasoline was shipped on a direct sale to the Iowa consignee from Oklahoma. The opinion does not state who solicited the order for the gasoline, but clearly it was a sale contract completed outside the State of Iowa.

As Chief Justice Hamilton pointed out in his dissenting opinion in the Sears, Roebuck case, the *Felt & Tarrant* case also involved a sale completed when the order was accepted in Illinois even though that order was the result of solicitation by a Felt & Tarrant Company salesman in California.

In the case of *Jagels, "a fuel corporation" v. Taylor*, 60 S. Ct. 469, affirming the decision of the New York Court of Appeals, 280 N. Y. 766, 21 N. E. (2nd) 526, this Court affirmed the judgment which had been returned by the New York Court of Appeals. An examination of the opinion in the New York Court of Appeals discloses that certain sales of coal made by Jagels, a Delaware Corporation, had been subjected to the New York City sales tax. It appeared that this company had a sales office in New York City, but no coal yard in that City. The company also had coal yards in the State of New Jersey. The sales concerning which the controversy arose fell within three classes.

The first involved orders received by telephone at the New York office and delivery to the customer in New York from a New Jersey yard; the second involved orders telephoned directly to New Jersey by the customer followed by a confirmatory written order and by delivery from a New Jersey yard to the customer in New York; the third involved written orders sent by the customer in New York to the New Jersey office followed by delivery from a New Jersey yard to the customer in New York. In all three classes the customer was billed from the New Jersey office and payment was made to that office.

Clearly in this *Jagels* case this Court, by affirming the decision of the New York Court of Appeals, upheld a tax similar in character to the Iowa use tax when applied to a mail order transaction. The third sale which was the subject of controversy in the *Jagels* case was a pure mail order transaction where the order was not apparently the result of personal solicitation by salesmen of the Jagels

Company and where the order was mailed to the out-of-state firm and there approved and delivery was made from the coal yard located outside the State and payment was made to the out-of-state seller at its location out of the State. In passing upon and affirming this *Jagels* case, this Court stated the judgment was affirmed and cited the cases of *McGoldrick v. Berwind White Coal Mining Co.*, 309 U. S. 33 (1940); *McGoldrick v. A. H. DuGrenier, Inc.*, 309 U. S. 70 (1940); *McGoldrick v. Felt & Tarrant Co.*, 309 U. S. 70 (1940). An examination of the first case of *McGoldrick v. Berwind White Coal Mining Company* shows quite clearly that the Court there upheld the New York City sales tax on the ground that delivery to the purchaser took place in the City of New York and not upon any ground that the contract of sale was also entered into in the State of New York. In this case the seller maintained sales offices within New York City at which orders for coal were received. The coal was then mined in Pennsylvania, shipped and delivered in the seller's barges to the purchaser at water's edge in New York City. This Court upheld the New York City sales tax imposing upon the vendor the duty to collect and pay the tax to the City of New York. It is true that in this case the receipt of the order, its acceptance, and the delivery of the thing sold, all occurred within the taxing jurisdiction, but the Court did not base its decision upon the ground that the contract was made in the City of New York. In the majority opinion the Court, in describing the tax stated:

> "It is conditioned upon events occurring within the State, either transfer of title or possession of the purchased property or an agreement within the State, 'consummated' there, for the transfer of title, or possession."

In the dissenting opinion the Court seemed to be of the opinion that the tax was a tax on delivery for the Court stated:

"It is urged that there is a taxable event within the State. That event is said to be the delivery of the coal."

"If because of the delivery in New York that State can tax the gross receipts from the sale * * *."

It seems quite clear that the Court in the *Berwind-White* case placed the incidence of tax upon the delivery in New York City and felt the place where the order was solicited or approved was immaterial. Both the majority and the dissenting opinion ignore the place where the order was solicited or approved.

Under the companion cases decided the same day it is made abundantly clear that this Court did not base the decision in the *Berwind-White* case on the ground that the sales contract for coal was entered into in New York on the ground that the order was solicited or secured through the New York sales office. That was not true in the *Jagels* case in the third manner of sale and there the tax was upheld on the authority of the *Berwind-White* case. Nor could the Court have upheld the tax on the ground that the transportation and delivery were through the seller's facilities, as in the *Jagels* case, for that was not true in the *DuGrenier* case where the machines were shipped by common carrier from Massachusetts direct to the New York City purchaser with the latter paying the freight.

Under the New York City Sales Tax Law a sale in New York was the incidence taxed and a "sale" was by the Act defined to mean:

"any transfer of title or possession or both * * * in any manner or by any means whatsoever for a consideration or any agreement therefor * * *."

Under the Act, transfer of possession was alone sufficient to sustain the tax. The transfer of possession in New York was the only incident common to all of the four cases decided January 29, 1940 by this Court. It mattered

not that the order for the sale was solicited by local salesmen or the contract of sale entered into in New York. It mattered not if delivery was made through the facilities of a common carrier with the purchaser paying the freight or in the seller's own trucks starting from a point outside New York. The taxable incident, namely, the transfer of possession occurred in New York and this transfer was made by one who was within the New York jurisdiction. These cases hold that under such a law that seller within the jurisdiction of New York could be compelled to collect the tax from the purchaser and pay it to the City.

Passing now to the Iowa Use Tax Law we find the incidence of the Iowa tax is use in the State of Iowa and "use" is defined to mean:

> "The exercise by any person of any right or power over tangible personal property incident to the ownership of that property. * * *"

Quite clearly the incidence of the tax must necessarily take place within the State of Iowa. The measure of the tax is the purchase price, but surely it can be said here, upon the authority of the New York City tax cases, that the manner of the solicitation of the order for sale is immaterial; the place where the order is accepted by the seller is immaterial; the manner of the delivery by the seller to the purchaser is immaterial.

Like the New York cases where the transfer of possession in New York was the only activity taxable so, too, under the Iowa law the use or exercise of ownership in Iowa is the only activity taxable. It is sufficient if this activity occurs within the borders of the State. If it does, then the seller within the jurisdiction of the State must accept the burden, placed on all other sellers to consumers in Iowa, to collect the tax for the State of Iowa.

Chief Justice Hamilton in his dissenting opinion in the *Sears, Roebuck* case, 292 N. W. 140 stated:

> "The Iowa use tax is not laid upon property outside state boundaries nor upon the sale of property made outside the state nor can it be said that the tax is upon any privilege exercised and enjoyed by appellee in other states. Contra, the tax is laid on the privilege of use within the state, and the incidental burden of collecting the tax is upon the privilege granted by the state to appellee—a privilege actually made use of—to engage in the retail business within the state. The place of making the sale has no connection with the duty of collecting the tax. The same duty applied to all retailers within the state no matter where the sale is made. The state in effect constitutes the retailer its agent for the purpose of collecting from the source, to wit, the purchaser, the tax which admittedly the purchaser-user owes the state. The state says to each retailer: 'In consideration of the right or privilege of engaging in the retail business in Iowa, you must aid the state in its administration of the law by performing this incidental duty of collecting the tax at the time of making the sale.'"

Under the Sales Tax Act, Section 11 (Appendix A) Code Section 6943.084, provision is made that all retailers must obtain a permit to do a retail business in the State of Iowa. Every retailer in Iowa must collect the sales tax, and it matters not whether the sale is an over-the-counter transaction or the result of a written sales contract. It is sufficient under the Sales Tax Act if there is a "transfer, exchange, or barter, * * * in any manner * * *" achieved. Clearly under the sales and use tax laws we need look no further than the intrastate activities which are the incidence of the tax. Once these are present, namely, use in Iowa or sale in Iowa, then the events in the transactions leading up to the incidence are all immaterial.

(c) The power to impose the duty of collecting the tax upon the seller in consideration of the grant of privilege to the seller to engage in the retail business in Iowa is not prohibited by the due process clause of the constitution.

In the dissenting opinion of Justice Mitchell in the case of *Sears, Roebuck & Company v. Roddewig*, 292 N. W. 130 at page 137 the argument is advanced that this duty to collect the tax as a prerequisite to engaging in business in Iowa is similar to the privilege or license tax upheld in the *Ford Motor Co. v. Beauchamp*, 308 U. S. 331. This is an entirely sound argument. There is no question but that the State of Iowa could tax the privilege of carrying on a retail business in the State of Iowa. The State of Iowa could also burden that privilege of carrying on a retail business within this State by imposing on those who carry on that business the duty to collect a tax from the purchasers. This was clearly illustrated in the case of *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412. In that case the State of Louisiana imposed a chain store tax graduated upon the basis of the number of stores included under the same general management, or ownership, whether operated in the State or not. The Great Atlantic & Pacific Tea Company, as complainant, and some 113 interveners, attacked the validity of the Louisiana chain store tax, bitterly assailing it as being violative of the 14th Amendment. They contended that the tax was upon operations outside of the State; that therefore, the statute imposing the tax denied to them the equal protection of the laws and they claimed that the right of Louisiana to exclude foreign corporations could not be used as a basis for taxing the complainant upon property that by established principles the State has no power to tax.

In the opinion the contention of the complainant and the interveners was rejected. At page 424 of the reported opinion the Court said:

"The appellants contend the Act deprives them of property without due process of law because the tax is imposed, at least in part, upon things which are beyond the jurisdiction of Louisiana. The state may not tax real property or tangible personal property lying outside her borders, nor may she lay an excise or privilege tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed. But as we have seen, the subject of the tax in question is the prosecution of a defined business activity within the State of Louisiana,—the conduct of a retail store which is a part of a chain under a single management, ownership or control,—a legitimate subject of a license or occupation tax. The measure of the exaction is the number of units of the chain within the state,—a measure, sanctioned by our decisions. The rate of tax for each such unit is fixed by reference to the size of the entire chain. In legal contemplation the state does not lay a tax upon property lying beyond her borders nor does she tax any privilege exercised and enjoyed by the taxpayer in other states."

Just as in the foregoing case the Supreme Court held that the State was not taxing property lying beyond her borders or taxing privileges enjoyed by the taxpayer in other states, so in the case at bar the State of Iowa is not imposing duties on the plaintiff by virtue of any activities or privileges enjoyed by the plaintiff in other states. Rather the State is imposing a duty upon the plaintiff to act as its agent in collecting certain taxes due it from citizens of the State of Iowa by virtue of privileges exercised and enjoyed by the plaintiff within the State of Iowa, to wit, the privilege of engaging in the retail business within the State of Iowa. There is no question as to the validity of the tax imposed upon the purchaser. It necessarily follows that there can be no question as to the right of the State of Iowa under its sovereign power to require the plaintiff, in this case a quasi-citizen of the State, to assist it in col-

lecting the tax due it by Iowa citizens on such sales as the plaintiff has made.

This argument was also recognized in the dissenting opinion of Justice Hamilton in the case of *Sears, Roebuck v. Roddewig*, 292 N. W. 130 at pages 140 and 141 where quotation is also made from the case of *Pierce Oil Company v. Hopkins*, 264 U. S. 137.

In the case of *Equitable Assurance Society v. Pennsylvania*, 288 U. S. 143 a Pennsylvania statute levying an annual tax of 2% upon the gross premiums received by the insurance company was upheld. The Company had paid the taxes on premiums paid to the Company outside the State by residents of Pennsylvania and thereafter sought refund. The very ground of extraterritoriality was urged by counsel and the opinion states:

> "The grounds for the only argument open are that a state cannot tax property beyond its jurisdiction. * * *; that it cannot effect that result indirectly by making the payment a condition of the right to do local business * * * and that as it could not prohibit the contracts it cannot impose the tax."

The Court held:

> "We are dealing with a corporation that has subjected itself to the jurisdiction of the state; there is no question that the state has a right to tax it, and the only doubt is whether it may take this item into account in fixing the figure of the tax. * * *
>
> "The tax is a tax upon a privilege actually used. The only question concerns the mode of measuring the tax * * * It is not unnatural to take the policyholders residing in the state as a measure without going into nicer, if not impracticable, details. Taxation has to be determined by general principles, and it seems to us impossible to say that the rule adopted in Pennsylvania goes beyond what the Constitution allows."

In *General De Tabocos v. Collector of Revenue*, 275 U. S. 98, we find the Supreme Court upholding the Government of the Philippine Islands in the latter's imposition of a tax based upon premiums paid to the plaintiff company. The facts and holding upon this point appear in the following quotation:

> "We come now to the question of the tax upon the premiums paid to the London Company, which was licensed and presumably was doing business in the Philippine Islands. Does the fact that while the Tobacco Company and the London Company were within the jurisdiction of the Philippines they made a contract outside of the Philippines for the insurance of merchandise in the Philippines, prevent the imposition upon the assured of a tax of 1 per cent upon the money paid by it as a premium to the London Company? We may properly assume that this tax placed upon the assured must ultimately be paid by the insurer, and treating its real incidence as such, the question arises whether making and carrying out the policy does not involve an exercise or use of the right of the London Company to do business in the Philippine Islands under its license, because their policy covers fire risks on property within the Philippine Islands which may require adjustment and the activities of agents in the Philippine Islands with respect to settlement of losses arising thereunder. This we think must be answered affirmatively under *Equitable Life Assurance Society v. Pennsylvania*, 283 U. S. 143, 59 L. Ed. 1239, 35 S. Ct. Rep. 829."

Surely the reasoning applied in the foregoing cases can be applied here with equal force. As the Court in the *Equitable Life Assurance Company* case stated, it is a "privilege" tax on the right to do business that is involved. And the right to measure that tax by the number of out-of-state transactions with citizens of the taxing state is upheld in each case. We submit the facts of our case do not go as far as these cases. We only ask the collection of the tax from our own citizens upon out-of-state transactions

very similar to the ones involved in the insurance cases. We ask that this be done in order to gain or hold a right to do business in this State. If the foreign corporation can be taxed by a tax that is measured by these out-of-state transactions, then surely the duty to collect a tax from others can be enforced.

The above two cases illustrate our argument under this subdivision. This burden of collecting the tax, even if it be called a tax to be paid by the seller is not a tax upon the sale as such, but if it be called a tax, it is a license tax measured it is true by the number and amounts of sales, but it does not lose its character of a license tax or regulation imposed upon the seller in return for the privilege of doing business in the State of Iowa. Such a license regulation or tax has always been held to be within the orbit of the State's taxing power.

(d) If intrastate activity in connection with the sale for use in Iowa be thought necessary, then such activity is present in this case.

In the previous subdivisions of this point we have sought to demonstrate that the tax at bar is indistinguishable upon the facts from the California use tax and the New York City sales tax recently sustained by this Court, as well as the Iowa gasoline tax sustained in the *Monamotor Oil Company* case. If we are correct in that contention then there is no need for further discussion.

If it be thought that the tax involved in this case is distinguishable, then it must be on the ground that there was in most of the cases an intrastate activity leading up to the sale. Such an activity was present in all of the cases except the *Jagels* case and possibly the *Monamotor Oil Company* case. We have argued that this could be no distinguishing feature, but in any event in these mail order sales there is a good deal of intrastate activity by the mail order house.

These activities are enumerated by Chief Justice Hamilton in his dissenting opinion in the *Sears, Roebuck* case, 292 N. W. 130 at page 139 where he stated:

> "Counsel is also wrong in saying there is no intrastate activity on the part of appellee in connection with the mail order business. The intrastate activities, in connection with mail order sales, consist first in the activity of the retailer, appellee, soliciting business from Iowa residents by means of distribution of large and small catalogues and special sales bulletins; by this means appellee displays its merchandise, its prices and gives its sales talk to Iowa customers; by this means it made, in 1937, 1,200,000 sales to Iowa residents. The activity of the purchaser within the State of Iowa consisted of making out the order, enclosing the purchase price, the carrying charge (and the requisite tax, if the law was obeyed), and placing the order in the mail and, after receipt of the goods, making use of them. The fact that the appellee, in distributing its catalogues, makes use of the express company or the United States mail instead of using its own motor trucks and making a house-to-house personal delivery of the catalogues does not make its conduct in this respect any less an activity within the state. Other activities within the State of Iowa, which obviously may be necessary, are —making adjustments in case of damaged, soiled, misfit or defective merchandise, or in the exchange of the merchandise, for any reason, which might require, in the adjustment, return of a portion of the purchase price paid; as to its credit or installment business, or might even require court action to repossess the property."

The activity of soliciting sales cannot be a question of degree. We only argue that there is evidence of solicitation for orders on the part of the mail order house. This is the only conceivable distinguishing characteristic between the mail order sale and the sale in the *Felt & Tarrant* case. That this activity of soliciting of orders by the catalog method is effective is amply demonstrated by the volume of mail order business done. There are, of course, other

obvious activities that would likely attend any business of selling, such as adjustments, credit inquiries and collection procedure.

POINT III.

The collection and payment provisions of the Iowa Use Tax Law as applied to the corporation's mail order business imposed no unconstitutional burden on interstate commerce.

The majority opinion of the Supreme Court of Iowa did not discuss the interstate commerce feature at length. The decision seems to be based upon the extraterritorial argument. But there are some references to the interstate commerce issue and since the trial Court in a written opinion (R. S. 62—R. M. 63) had held the law violative of the commerce clause and since the Supreme Court of Iowa stated the trial Court was correct in holding the law unconstitutional, we have felt it necessary to give brief consideration to this issue. Moreover, the last case cited by Justice Miller in the majority opinion on page 136 of the opinion in 292 N. W., is the case of *McCarroll v. Dixie Greyhound Lines*, 60 S. Ct., 504. This case only involved a question of the constitutionality of an Arkansas statute under the commerce clause.

It may be that counsel will not even urge that the law, as applied to the mail order business violates the commerce clause. Such an argument was advanced in the argument in the State Supreme Court, and it is only out of an abundance of caution that we present any argument of constitutional validity on that ground. Indeed as we analyze the decisions of the Supreme Court of the United States we can well understand why the Supreme Court of Iowa did not place the decision upon the ground that the statute imposed an unconstitutional burden on interstate commerce.

The interstate commerce clause does not prohibit state taxes, but it merely places in Congress the right to regulate interstate commerce. A state tax is not invalid under this clause of the Constitution unless it so far affects the commerce as to amount to a regulation that impairs the authority of Congress.

Direct attempts to regulate, except when justified under the police power or by the consent of Congress, have always been outlawed, but here we are dealing not with a regulatory statute but with a taxing statute. Taxing statutes, the effect of which is to place undue burdens upon the introduction of goods of other states, or which in any manner interfere with the free flow of interstate commerce, have likewise been condemned under the commerce clause. But on the other hand, taxing statutes which do not subject interstate commerce to a greater burden, or to the danger of a greater burden, than would result if interstate commerce were not involved, have invariably been upheld. The function of the commerce clause is to maintain equality between interstate and intrastate commerce. It does not entitle the interstate merchants to an advantage over local competitors, nor does it permit them to carry on their business without paying any part of the expense of the local governments that protect the various phases of their activities.

Whether or not a state taxing statute interferes with interstate commerce is a question of fact. An examination of the Iowa Use Tax Act clearly shows that no burden upon interstate commerce can result. The State of Iowa has in effect said to all persons who buy property in the State or who buy property for use in this State, "you shall pay a tax of 2% of the purchase price of such property." The purchaser pays the same tax whether the property which he purchases was stored in Iowa or in some other state; in both cases the tax is the same; in both cases the incidence of the tax is

on a person whose only part in the transaction was to order, pay for, and obtain possession of the property in the State of Iowa from a seller who offered the property for sale.

How can such a tax constitute interference with interstate commerce? The interstate merchant is being subjected to the same duty to collect the tax that his competitor, the intrastate merchant, must perform. The purchaser from the interstate merchant is being subjected to the same tax of 2% of the purchase price that the purchaser from the intrastate merchant must pay.

On the other hand, if the tax is held void, the effect upon intrastate commerce immediately becomes apparent. No local merchant will make any sales at all if similar goods are offered by his competitors from other states; every purchaser will pass him by to seek the vendor whose goods are free from tax. If exemption from this tax constitutes a subsidy to interstate commerce at the expense of local commerce, it follows that its imposition resulting inevitably in complete equality cannot be a burden upon interstate commerce. We do not believe it necessary to consider the constitutional validity of this tax under the commerce clause as an original proposition. The Iowa use tax is indistinguishable upon the facts from the many cases recently sustained by this Court. We have cited a number of authorities under this point in the summary of this brief and we feel it would unduly extend this brief to make a factual analysis of all of these cases. We will only discuss the case of *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62 and call the Court's attention to the recent cases upholding the New York City sales tax in interstate transactions.

It will be recalled in the *Felt & Tarrant Mfg. Co.* case involving the application of the California Use Tax Law upon the sales of comptometers by the Illinois corporation in the State of California the contention was made

"The treatment of the appellant as a retailer subject to the provisions of the California Use Tax Act is a direct burden upon interstate commerce prohibited by the Federal Constitution."

There the Use Tax Act, as here, was complementary to the Sales Tax Act. The burden was upon the seller to collect the tax from the California purchasers. The only distinction that can be made upon the facts in the two cases is that in the *Felt & Tarrant* case soliciting agents secured the order which was later accepted in Illinois, while, presumably, in the mail order case the order is not the result of any personal solicitation by agents. We have disposed of this distinction in our argument under the extraterritorial point, but in any event it would make no difference insofar as the Act results in a burden upon interstate commerce. In both cases the transaction is clearly an interstate transaction and we feel the same result should follow, namely, that no burden upon interstate commerce results when that commerce is merely subjected to the same burden borne by intrastate commerce.

To the same effect are the cases of *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940); *McGoldrick v. Felt & Tarrant Mfg. Co.*, 309 U. S. 70 (1940); *McGoldrick v. A. H. DuGrenier, Inc.*, 309 U. S. 70 (1940); *Jagels, "a fuel corporation" v. Taylor*, 60 S. Ct. 489, all upholding the New York City Sales Tax upon interstate activities.

Since the *Berwind-White* case is the controlling decision in the last four cases cited, the following quotation illustrates this Court's conclusion that such taxes do not place an unconstitutional burden upon interstate commerce. In the opinion reported in 309 U. S. at page 59 the Court stated:

"Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption. It is an activity which apart from its effect on the commerce, is subject to the state taxing

power. The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce."

Our Iowa Use Tax Law is a nondiscriminatory exaction by the State of Iowa when it is made to apply to all purchasers for use in the State of Iowa. This we submit upon reason and upon the authorities cited above is no economic barrier and no burden upon interstate commerce. The commerce clause was intended to prevent burdensome state restrictions on interstate trade, not to destroy local trade by granting exemptions and immunities with respect to goods simply because they were acquired in interstate commerce.

CONCLUSION.

The decision of the Iowa Supreme Court in the Sears, Roebuck case was met with some dismay by the legal writers of this Country. The Editor of the Interstate Sales Tax Service of Commerce Clearing House, Inc. on page 435 in paragraph 2-410 has the following comment to make in his discussion of this decision:

"This decision (Sears, Roebuck & Co.) although it involves solely mail order business, is difficult to understand and for the time being, at least, apparently stands in a class by itself, as it will be noted that the plaintiff on the appeal was a foreign corporation qualified in Iowa and carried on an extensive intrastate business through numerous retail stores maintained in the state. The soundness of this decision, which it may be anticipated will be carried to the Supreme Court of the United States, is debatable, in that it is difficult to reconcile same with the controlling decision of the Supreme Court of the United States in *Felt & Tarrant Mfg. Co. v. Gallagher et al.* ('39), 306 U. S. 62, 59 Sup.

Ct. 376, in which it was held that enforcement of collection of the California "use" tax through the medium of a foreign corporation seller, which, although it maintained an office in the state, transacted no intrastate business therein but maintained its office exclusively for the purpose of facilitating interstate commerce business, was not violative of the interstate commerce clause of the United States Constitution. The difficulty of reconciling the Iowa case with the Felt & Tarrant decision is rather convincingly pointed out and emphasized in the dissenting opinion."

Practical, social and economic consideration require that this tax be sustained. To interpret the Iowa Use Tax Law so as to give the mail order houses a 2% subsidy over local merchants is repugnant to every principle of equality between citizens and states which it was the purpose of the Constitution to establish and protect. No burden is placed on interstate commerce by the refusal to grant a 2% subsidy over intrastate commerce. No extraterritorial activity is taxed or regulated by a nondiscriminatory collection burden placed on the right to engage in the retail business within this State.

We respectfully submit that the collection and payment provisions of the Iowa Use Tax Law as applied to the corporation's mail order business constitute a valid and constitutional exercise of the taxing power of the State of Iowa.

Respectfully submitted,

JOHN M. RANKIN, Attorney General of Iowa,
JOHN E. MULRONEY, Assistant Attorney General,
Counsel for Petitioners.

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CHARLES ELMORE CROPLI...

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 255.

LOUIS E. RODDEWIG, as Chairman of the Iowa State Board of Assessment and Review, and Individually; D. L. Murrow and C. Frank Green, as Members of the Iowa State Board of Assessment and Review, and Individually,
Petitioners,

vs.

SEARS, ROEBUCK AND CO.

No. 256.

LOUIS E. RODDEWIG, as Chairman of the Iowa State Board of Assessment and Review, and Individually; D. L. Murrow and C. Frank Green, as Members of the Iowa State Board of Assessment and Review, and Individually,
Petitioners,

vs.

MONTGOMERY WARD AND CO., INCORPORATED.

RESISTANCE OF SEARS, ROEBUCK AND CO., RESPONDENT IN NO. 255, TO PETITION FOR WRIT OF CERTIORARI.

CHARLES LEDERER,
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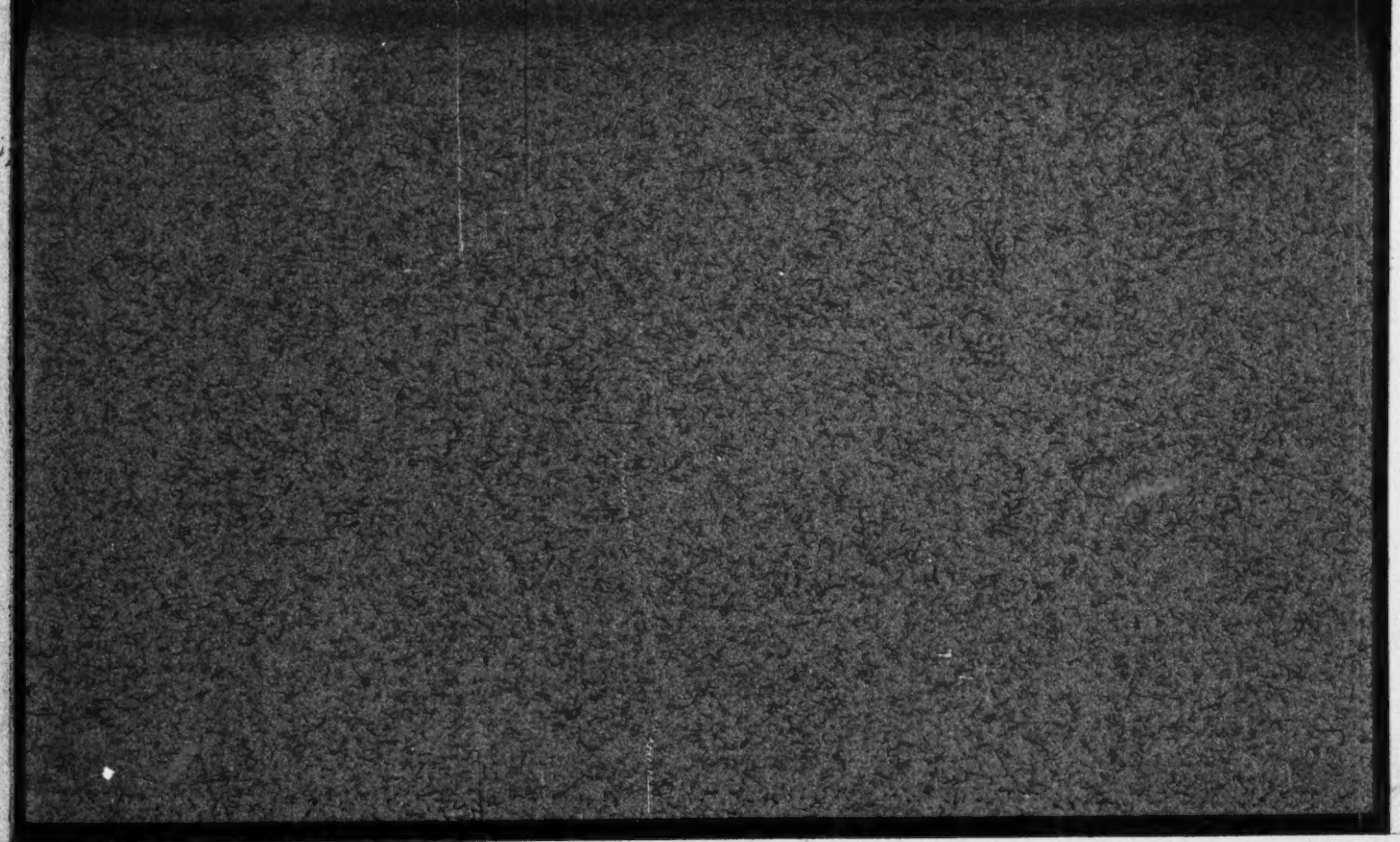

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 255.

LOUIS E. RODDEWIG, as Chairman of the Iowa State Board of Assessment and Review, and Individually; D. L. Murrow and C. Frank Green, as Members of the Iowa State Board of Assessment and Review, and Individually,
Petitioners,

vs.

SEARS, ROEBUCK AND CO.

No. 256.

LOUIS E. RODDEWIG, as Chairman of the Iowa State Board of Assessment and Review, and Individually; D. L. Murrow and C. Frank Green, as Members of the Iowa State Board of Assessment and Review, and Individually,
Petitioners,

vs.

MONTGOMERY WARD AND CO., INCORPORATED.

RESISTANCE OF SEARS, ROEBUCK AND CO., RESPONDENT IN NO. 255, TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The question presented by this case is whether the action of the petitioners in threatening the revocation of respondent's permit to do business in the State of Iowa as a foreign corporation and the cancelation of the retail merchant's licenses issued to respondent for each of its retail stores because respondent has not collected or paid the taxes imposed by the so-called Iowa Use Tax Act on sales consummated entirely by mail from its mail order houses located without the State of Iowa, the goods involved in such sales being shipped by mail or other common carrier transportation facility as designated by the purchaser, constitutes a violation of the rights of respondent under Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 8 of Article I of the United States Constitution.

THE FACTS.

The following uncontradicted facts are shown by the opinion of the Iowa Supreme Court which is referred to and by reference incorporated in the petition for writ of certiorari (Petition for Writ of Certiorari, page 4).

"At the trial, it was stipulated that the plaintiff, in the conducting of its business, made sales of tangible personal property to residents or persons within the State of Iowa, by three methods, referred to as types. Type I involves sales made in its retail stores located in Iowa, which sales are subject to the Iowa sales tax. Type II involves special order sales wherein the purchaser orders from one of plaintiff's retail stores in Iowa tangible property not carried in stock by the store, but carried by one of the mail order establishments located outside of Iowa; the order is given to the local store with the purchase price, which includes trans-

portation charges; the store orders the shipment to be made direct to the purchaser from a mail order establishment, where the order is filled charging the local store with the cost price, plus overhead and transportation charges; the purchase price paid to and received by the local store is retained by it and included in the volume of its gross sales. Type III involves mail order sales. A person or resident of Iowa prepares his order, or has it prepared for him, sends it to one of plaintiff's mail order establishments located outside of Iowa, with a remittance of the purchase price, plus transportation charges, specifying the means of transportation; the order is accepted or refused at the mail order establishment; if accepted, the order is filled by direct shipment to the purchaser through the United States Mail, or some common carrier specified by the purchaser.

"It was stipulated for the purposes of this case that plaintiff is obligated to collect and has collected and paid the tax imposed upon all sales made by it to residents of Iowa classified as Types I and II, but that as to Type III, mail order sales, it failed and refused to collect the use tax imposed by the use tax act. (Record, 133; 292 N. W. Reporter at 131)

"The only activities of plaintiff involved herein are the sales made pursuant to its mail order business. As to all other activities, for the purposes of this case, plaintiff concedes that the tax must be paid and it has been collected and paid. The mail order sales, however, do not constitute activities within the State of Iowa, nor do such sales constitute doing business within the state. The sales are consummated outside the State of Iowa in each instance. They are separate and distinct from plaintiff's activities in Iowa. The statute here challenged seeks to impose upon plaintiff the obligation that it 'shall at the time of making such sales, whether within or without the state, collect the tax imposed by this chapter from the purchaser'. The

sales are made outside of Iowa and the statute requires plaintiff to collect the tax at the time the sales are made." (Record, 142-143; 292 N. W. Reporter at 135)

The following facts appear upon the face of the petition for a writ of certiorari:

"Sears, Roebuck and Company and Montgomery Ward and Company are non-resident corporations licensed to do business in the State of Iowa. Pursuant to such licenses they have established and are now conducting various retail stores in Iowa. In addition to the businesses conducted in Iowa, these corporations each conduct a mail order business through mail order stores or establishments located outside of Iowa. From time to time mail order catalogs are sent to prospective customers in Iowa and the Iowa customers send orders by mail to such mail order stores located outside of Iowa and the orders are there filled and the merchandise shipped to the purchasers in Iowa.

"The Iowa Use Tax Act provides that every retailer maintaining a place of business in the State and making sales of tangible personal property for use in the State shall at the time of the making of the sale, whether within or without the State, collect 2% use tax from the purchaser. Other provisions of the Act provide that the tax shall constitute a debt owed by the retailer to the State and further that whenever the retailer maintaining a place of business in the State is a corporation authorized to do business in Iowa and fails to comply with the provisions of the Iowa Use Tax Act, then the retailer's license and the permit authorizing the corporation to do business in the State of Iowa may be revoked.

"Sears, Roebuck and Company and Montgomery Ward and Company, hereafter called the corporations, have not collected or paid a use tax on such mail order sales to the Iowa residents. Louis E. Roddewig, D. L. Murrow and C. Frank Green, members of the Iowa State Board of Assess-

ment and Review, hereafter called the Board, adopted a resolution threatening to revoke the corporations' retailers licenses and permits to do business in Iowa for failure to collect and pay the use tax on mail order sales of tangible personal property to the residents of Iowa." (Petition for Writ of Certiorari, pp. 2-3)

THE STATUTES INVOLVED.

Certain provisions of Chapter 329.4, Code of Iowa, 1939, commonly known as the Iowa Use Tax Act, as applied to respondent's mail order business, are here involved. These provisions are reflected in Section 6943.109, which provides that retailers maintaining a place of business in the state and making sales of tangible personal property for use in the state "shall at the time of making such sales, *whether within or without the state*, collect the tax imposed * * *". (Italics ours)

Section 6943.112 provides that "the tax herein required to be collected by any retailer pursuant to Section 6943.109 * * * shall constitute a debt owed by the retailer to this state".

Section 6943.122 provides that whenever the retailer maintaining a place of business in Iowa is a foreign corporation authorized to do business in Iowa, and said corporation fails to comply with the provisions of the Act, then the corporation's permit to do business in Iowa as a foreign corporation and its retail licenses may be revoked.

REASONS WHY THE WRIT SHOULD NOT ISSUE.

I.

Under the facts disclosed upon the face of the petition for writ of certiorari and the opinion of the Supreme Court of Iowa sought to be reviewed, it plainly appears that the threatened action of the petitioners constituted a regulation

of respondent's activities outside the State of Iowa and that therefore the decision of that court is in accord with applicable decisions of this court and this court should exercise its discretion and deny the petition for the writ.

Rule 38, par. 5, subdivision a.

Connecticut General Life Ins. Co. v. Johnson, 303 U. S. 77; 82 L. ed. 673.

New York Life Ins. Co. v. Dodge, 246 U. S. 357; 62 L. ed. 772.

New York Life Ins. Co. v. Head, 234 U. S. 149; 58 L. ed. 1259.

Home Insurance Co. v. Dick, 281 U. S. 397.

Hartford Accident & Ind. Co. v. Delta & P. Land Co., 292 U. S. 143; 78 L. ed. 1178.

Pennoyer v. Neff, 95 U. S. 714; 24 L. ed. 565.

St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346; 67 L. ed. 297.

Baldwin v. Seelig, 294 U. S. 511; 79 L. ed. 1032.

Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426; 70 L. ed. 664.

New York, Lake Erie & Western Ry. v. Pennsylvania, 153 U. S. 628; 38 L. ed. 847.

II.

Since petitioners claim that under Section 6943.109, Code of Iowa 1939, respondent was required to make collection of the tax involved at the time of making its mail order sales outside the State of Iowa, and since by Section 6943.-112, Code of Iowa 1939, the tax required to be collected by any retailer pursuant to Section 6943.109 is declared to constitute a debt owing by the retailer to the State of Iowa, in legal effect, under the facts appearing on the face of the petition for the writ of certiorari and the opinion of the court below, the threatened enforcement of these provisions constitutes the imposition of a tax upon respondent's gross receipts upon its mail order business consummated without the State of Iowa; and the decision of the Iowa Supreme Court holding that the due process clause

of the Fourteenth Amendment denies to that state the power to tax respondent's activities outside the state, is in accord with the applicable decisions of this court and this court should exercise its discretion and deny said petition.

James v. Dravo Contracting Co., 302 U. S. 134; 82 L. ed. 155.
Connecticut General Life Ins. Co. v. Johnson, 303 U. S. 77; 82 L. ed. 672.
Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194; 50 L. ed. 150.

Where an impost is levied by authority of a government upon its citizens or subjects for a governmental purpose, it is not a debt but is a tax.

Bailies v. City of Des Moines, 127 Iowa 124, at 126.
Liberty Mutual Ins. Co. v. Johnson Shipyards Co., 6 Fed. (2d) 752.

III.

Under the facts appearing upon the face of the petition for the writ of certiorari and the opinion of the Supreme Court of Iowa sought to be reviewed, the consummation of the threatened action of petitioners would constitute a regulation of and substantial burden and impairment of the free flow of interstate commerce, contrary to the provisions of Section 8 of Article I of the Constitution of the United States, and therefore the decision of the Supreme Court of Iowa is in accord with the applicable decisions of this court and this court should therefore exercise its discretion and deny said writ.

Heyman v. Hayes, 236 U. S. 178; 59 L. ed. 527.
Montgomery, Ward & Co. v. Fry (Michigan), 269 N. W. 166.
Puget Sound Stevedoring Co. v. Tax Commissioner, 302 U. S. 90; 82 L. ed. 68.
Fisher's Blend Station v. Tax Commission, 297 U. S. 650; 80 L. ed. 956.

Crew Levick v. Pennsylvania, 245 U. S. 292; 62 L. ed. 295.
Adams Mfg. Co. v. Storen, 304 U. S. 307; 82 L. ed. 1365.

ARGUMENT.

Review on writ of certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are special and important reasons therefor; and, where the decision sought to be reviewed is one of a state court, even though of a federal question of substance, it is only if such decision is probably not in accord with the applicable decisions of this court that certiorari will be granted. *United States Supreme Court Rules*, Rule 38, par. 5, subdivision a.

Conversely, even though a federal question of substance has been decided, if upon the undisputed facts it appears that a decision of the state court sought to be reviewed, is in accord with the applicable decisions of this court, then, we submit, this court should exercise its sound judicial discretion and deny the writ.

I.

The holding of the Iowa Supreme Court sought to be reviewed, that the Iowa Use Tax Act as construed and administered by petitioners constituted a regulation of the activities of respondent outside the state and was therefore void as violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States, is in accord with the applicable decisions of this court.

We have heretofore stated the facts shown by the petition for the writ of certiorari and the opinion of the Supreme Court of Iowa which is referred to in the petition for the writ. Under these undisputed facts it appears that the only trans-

actions involved in this case are what are referred to as mail order sales consummated by respondent at its mail order establishments, each of which is located outside the State of Iowa. These sales are the result of the circulation of catalogs by respondent through the United States mail from one or the other of its mail order establishments to individuals resident within the State of Iowa, and are initiated by an order made out by a resident of Iowa and forwarded by mail to respondent's mail order establishment outside the state together with remittance covering the purchase and the cost of and specifying the means of transportation. The transaction is consummated by the direct shipment from respondent's mail order houses located without the State of Iowa to such customer within the State of Iowa, by mail or other common carrier service, of the goods so ordered.

Under these facts the Iowa Supreme Court held:

> "The only activities of plaintiff involved herein are the sales made pursuant to its mail order business. As to all other activities, for the purposes of this case, plaintiff concedes that the tax must be paid and it has been collected and paid. The mail order sales, however, do not constitute activities within the State of Iowa, nor do such sales constitute doing business within the State. The sales are consummated outside the State of Iowa in each instance. They are separate and distinct from plaintiff's activities in Iowa. The statute here challenged seeks to impose upon plaintiff the obligation that it 'shall at the time of making such sales, whether within or without the state, collect the tax imposed by this chapter from the purchaser.' The sales are made outside of Iowa and the statute requires plaintiff to collect the tax at the time the sales are made. It clearly seeks to regulate activities of plaintiff outside the state. Under the provisions of Section 6943.122, defendants seek to cancel plaintiff's license as a retailer in this state and its permit to do business here as a foreign corporation for failure to pay a debt which constitutes a regulation of its activities outside

of Iowa. Under repeated pronouncements of the Supreme Court of the United States, hereinbefore reviewed and quoted from, the State of Iowa has no such right." (Record, 143, 144; 292 N. W. at 135)

This conclusion, we submit, is entirely in accord with the controlling applicable decisions of this court.

In *Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77, 82 L. ed. 673, the Supreme Court, in an opinion rendered January 31, 1938 and written by Mr. Justice Stone, had under consideration the validity of a tax laid by the State of California on the receipt by appellant in Connecticut of insurance premiums during the years 1930 and 1931 upon reinsurance contracts. The contracts were entered into with insurance companies which were doing business in the State of California and which companies had effected life insurance contracts on residents of California. In holding that such tax was invalid as a violation of the limitations prescribed by the Fourteenth Amendment to the Federal Constitution, the court said:

> "As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence, it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. * * * It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

In *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346, 67 L. ed. 297, the court, speaking through Justice Holmes, said:

> "It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside."

These decisions of this court are merely a restatement of the long-settled rule that the sovereign powers of a state are limited to its territorial boundaries.

In *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, this court said:

> "The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. L., ch. 2; Wheat. Int. L., pt. 2, ch. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions."

Nor may the power of the state to regulate activities performed without the state be enlarged because one of the parties to such activities is a citizen of such state.

> *Hartford Accident & Ind. Co. v. Delta & P. Land Co.* 292 U. S. 143, 146; 78 L. ed. 1178.

Nor is the power of the state to so regulate such activities performed outside the state enlarged merely because such activities involve contracts relating to property within the state.

> *Fidelity & Deposit Co. v. Tafoya*, 270 U. S. 426; 70 L. ed. 664.

See also:

New York Life Ins. Co. v. Dodge, 246 U. S. 357, 375; 62 L. ed. 772.

New York Life Ins. Co. v. Head, 234 U. S. 149, 164; 58 L. ed. 1259.

Home Ins. Co. v. Dick, 281 U. S. 397, 407; 74 L. ed. 926.

James v. Dravo Contracting Co., 302 U. S. 134, 139; 82 L. ed. 155.

Baldwin v. Seelig, 294 U. S. 511, 521; 79 L. ed. 1032.

New York, Lake Erie & Western Ry. Co. v. Pennsylvania, 153 U. S. 628; 38 L. ed. 847.

And the constitutional limitation upon the power of the state to regulate activities outside its borders may not be avoided under the guise of a license or otherwise.

In *New York Life Ins. Co. v. Head*, 234 U. S. 149, 164; 58 L. ed. 1259, the court, speaking by Mr. Justice White, said:

> "It is true it has been held that, in view of the power of a state over insurance, it might, as a condition of a license given to a foreign insurance company to do business within its borders, impose a condition as to business within the state, which otherwise, but for the complete power to exclude, would be held repugnant to the Constitution. In other words, that a company having otherwise no right whatever, for any purpose, to go in without a license, would not be heard, after accepting the same, to complain of exactions upon which the license was conditioned as unconstitutional, because of its voluntary submission to the same. But even if it be put out of view that this doctrine has been either expressly or by necessary implication overruled, or at all events, so restricted as to deprive it of all application to this case (see *Harrison v. St. Louis & S. F. R. Co.*, 232 U. S. 318, 332, 34 S. Ct. 333, 58 L. Ed. [621, 626] [L. R. A. 1915F, 1187], and authorities there cited), it here can have no possible application since such doctrine, at best, but recognized the power of a state, under the circumstances stated, to impose conditions upon the right to do the business embraced by the license, and therefore gives no support to the contention here presented, which is that a state, by a license, may acquire the right to exert an authority be-

yond its borders which it cannot exercise consistently with the Constitution. *But the Constitution and its limitations are the safeguards of all the states, preventing any and all of them, under the guise of license or otherwise, from exercising powers not possessed.*" (Italics ours)

Nor is the power of the state to regulate activities so performed without its borders by a foreign corporation qualified to do business in the state enlarged because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within.

In *Connecticut General Life Ins. Co. v. Johnson, supra,* it is said:

> "It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

It appears from the undisputed facts shown by the petition for the writ of certiorari and the opinion of the court below whose decision is sought to be reviewed, that while respondent has qualified as a foreign corporation in the State of Iowa and maintains retail mercantile establishments there, all activities with which such retail mercantile establishments have any connection whatsoever have been by respondent subjected to said act and the tax therein prescribed has been paid.

Upon the direct shipment of goods pursuant to a mail order from one of respondent's mail order establishments located without the State of Iowa to a resident of the State of Iowa by mail or other common carrier service, the respondent loses all dominion and control over such goods,

and, under the undisputed facts shown by the petition for the writ and the opinion of the Supreme Court of Iowa whose decision is sought to be reviewed, does not thereafter perform any activity within the State of Iowa with respect thereto.

Under such undisputed facts, then, we submit the decision of the Iowa Supreme Court, that the Iowa Use Tax Act as construed and administered by the petitioners and as applied to the mail order sales of respondent constitutes the regulation of activities of respondent outside the State of Iowa and is therefore void, is in accordance with the foregoing controlling and applicable decisions of this court and therefore this court should, we submit, exercise its sound judicial discretion and deny the writ.

Nor is this conclusion contrary to the following cases, cited as supporting the petition for a writ of certiorari, for the reason that in each of such cases the non-resident shipper either made physical delivery of the property by its agent in the state of the residence of the purchaser or performed some other activity therein with respect thereto, and the laws of which contained use tax collection provisions similar to those involved in this case.

In *Felt & Terrant Mfg. Co. v. Gallagher*, 306 U. S. 62, 83 L. ed. 488, in holding the collection provisions of the California use tax as valid and applicable to the non-resident shipper under the facts in that particular case, the court said:

> "Appellant, an Illinois corporation, is engaged in manufacturing and selling comptometers in that state and delivering these to purchasers in various parts of the Union."

The fact is thus brought out that the appellant made deliveries of the comptometers it sold to purchasers located in various states. Indeed it appears from the decision of

the Supreme Court in that case as well as the trial court in *Felt & Tarrant Mfg. Co. v. Corbett*, 23 Fed. Sup. 186, that the company maintained agents and offices in the State of California and that such agents made deliveries of the merchandise sold to customers resident in California after such merchandise had been shipped from Illinois to such agents.

It seems clear that delivery of the comptometers was considered by the court as an activity of the company in the State of California after the interstate commerce had ceased and the goods shipped had come to rest, and therefore subjected it to regulation by the state.

Likewise in *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, 78 L. ed. 1141, the court sustained the jurisdiction of Iowa to require the seller to collect a use tax on an interstate shipment of gasoline into Iowa, but from the opinion of the court it appears that the seller's place of business in connection with such transactions was within the State of Iowa and that at least in many instances actual physical deliveries were made by it to its customers in Iowa. Thus again the decision of the court is based on a state of facts utterly different from those appearing here.

In the recent case of *McGoldrick v. Berwind-White Coal Mining Co.*, ... U. S. ..., 84 L. ed. Adv. Sheet 343, the court upheld the provisions of the New York City tax upon shipments of coal from without the state to residents of New York City as against the claim that such tax and the collection provisions incident thereto constituted an unconstitutional burden on interstate commerce, and said that the only relation of the tax to interstate commerce

> "arises from the fact that immediately preceding *transfer of possession to the purchaser within the state*, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. (P. 348 L. ed. Adv. Sheet)

> Here the tax is conditioned upon a local activity *delivery of goods within the state* upon their purchase for consumption. It is an activity which apart from its effect on the commerce, is subject to the state taxing power." (P. 354 L. ed. Adv. Sheet) (Italics ours)

Thus it appears that a local activity by the seller, such as delivery of the physical property to the purchaser within the confines of the taxing state, is a necessary prerequisite as a matter of fact to the justification of the exercise of either the taxing or regulatory powers of the state of the purchaser's residence, and, as we have pointed out, under the undisputed facts hereinbefore set forth, there was neither physical delivery of the goods by respondent as the seller nor any other local activity by it performed within the State of Iowa with respect to the transactions involved. The receipt of the orders with the purchase price and transportation charges including the designation of method of shipment by the purchaser at the mail order establishment of respondent without the state, the acceptance thereof there, the filling of such orders there, and the direct shipment of the goods covered by such orders to such customer from such mail order houses without the state, establishes that the respondent performed no local activity with respect to such transactions within the State of Iowa. Delivery through the United States mail or other common carrier of such direct shipments constituted delivery to such purchasers at the places of business of the mail order houses of repondent, all of which were without the state.

So, because of the differences in point of fact, the foregoing cases not only do not constitute controlling authority justifying the granting of the petition for the writ, but really constitute authority calling for the denial of the writ in the exercise of this court's sound discretion, for the cases just referred to indicate the furthest point to which this court has gone in sustaining state jurisdiction over a non-resident

seller for taxation or regulation in connection with interstate sales is where the seller makes delivery to the buyer or performs some other activity in connection with the particular transaction in the state asserting jurisdiction to so tax or regulate.

II.

The requirement of said act (Section 6943.100 Code of Iowa 1939) that respondent collect the tax at the time of making its mail order sales outside the State of Iowa and the provision that such taxes so required to be collected shall constitute a debt owing by the respondent to the State of Iowa (Section 6943.112 Iowa Code 1939), in legal effect imposes a tax upon the activities of respondent outside the state, and the decision of the Supreme Court of Iowa here sought to be reviewed that such exaction violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, is in accord with the applicable decisions of this court, and this court should exercise its discretion and deny said petition.

An examination of Chapter 329.4, the Iowa Use Tax Act, which is made an exhibit to the argument in support of the petition for the writ of certiorari, will show that the tax therein provided is for general governmental purposes.

Where an impost is levied by authority of a government upon its citizens or subjects for a governmental purpose, it is not a debt but is a tax.

In *Bailies v. City of Des Moines*, 127 Iowa 124 at 126, the court, in considering this question, said:

> "The general tenor of the authorities is to the effect that a tax in its essential characteristics is not a debt, but an impost levied by authority of government upon its citizens or subjects for the support of the state. It is not founded on contract or agreement, but operates *in invitum*. Whereas a debt is a sum of money

due by certain and express agreement, and originates in or is founded upon contracts express or implied. In *Meriwether v. Garrett*, 102 U. S. 472, (26 L. ed. 197), it is said: 'A tax is a charge imposed by the Legislature for the purpose of revenue. It is not founded upon contract, and does not establish the relation of debtor and creditor. It is an enforced proportional contribution levied by authority of the State.' See, also, the long collection of cases in volume 2, Words and Phrases, page 1883."

In *Liberty Mutual Ins. Co. v. Johnson Shipyards Co.*, 6 F. (2d) 752, it was held:

"A 'debt' is a sum of money due on contract, express or implied, or one which is evidenced by a judgment; and 'taxes' are not debts but imposts levied by government for its support or for some special purpose which the government has recognized, and are due to the government in its sovereign capacity, while debts are due to the government in its corporate capacity."

And where such tax is upon activities which were carried on without the territorial limits of the state, it has no jurisdiction to impose the same.

In *James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155, the court had under consideration the validity of a statute of West Virginia imposing an annual privilege tax upon the business of contracting. The Contracting Company in that case had four contracts with the United States Government for the construction of locks and dams in the Kanawha River and locks in the Ohio River, a part of activities in connection with which were performed in the state of West Virginia but other parts of activities in connection with which were performed outside the state of West Virginia, and, in deciding the question whether the state had the territorial jurisdiction to impose the tax measured by the gross receipts of the Contracting Company un-

der such contracts, this court, speaking by Chief Justice Hughes, said:

> "As to Territorial Jurisdiction.—Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia, the state had no jurisdiction to impose the tax. * * *
>
> A large part of respondent's work was performed at its plant at Pittsburgh. The stipulation of facts shows that respondent purchased outside the State of West Virginia materials used in the manufacture of the roller gates, lock gates, cranes, substructure racks and spur rims, structural steel, patters, hoisting mechanism and equipment, under each of its contracts, and fabricated the same at its Pittsburgh plant. The roller gates and the appurtenant equipment were preassembled at respondent's shops at Pittsburgh and there were inspected and tested by officers of the United States Government. The materials and equipment fabricated at Pittsburgh were there stored until time for delivery, and the appropriate units as prepared for shipment were then transported by respondent to the designated sites in West Virginia and there installed. * * *
>
> It is clear that West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work done in Pennsylvania."

The due process clause of the Fourteenth Amendment to the Federal Constitution denies the State of Iowa the power to impose a tax upon respondent's gross receipts realized from the conduct of its mail order business at its establishments outside the State of Iowa. The Supreme Court in *Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77, 82 L. ed. 673, speaking to this question, said:

> "But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions

within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. * * * It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

The Supreme Court of Iowa in its opinion, in speaking to this question, said:

"Defendants contend that the tax is a tax upon the use of property in this state, is really a tax upon the purchaser and is not a tax upon the plaintiff at all. Perhaps from a subtle and technical standpoint this may be true, but, if true, it is unimportant. Section 6943.109 requires that the tax be collected when the sale is made. Under the facts herein, the property is then without the state. Section 6943.112 makes the amount of the tax a debt owed by plaintiff and Section 6943.122 provides that a failure to pay that debt shall constitute proper grounds for revoking plaintiff's permit to do business in this state. From any reasonable or practical standpoint, the amount of the tax being made a debt of plaintiff, the statute at least constitutes regulation of plaintiff's activities outside the state as a condition to it being granted a license to do business in the state. This cannot be done." (Record, 136; 292 N. W. 132)

We submit the decision of the Supreme Court of Iowa that the State of Iowa was without power to compel respondent to pay the amount of the tax so levied on account

of its mail order sales consummated entirely outside the borders of Iowa, is in accord with the foregoing applicable decisions of this court, and this court should exercise its sound judicial discretion and deny the petition for the writ.

III.

Under the undisputed facts appearing on the face of the petition for a writ of certiorari and the opinion of the Supreme Court of Iowa, whose decision is sought to be reviewed, the Iowa Use Tax Act as construed and administered by petitioners, constitutes a regulation of and substantial burden and impairment of the free flow of interstate commerce, contrary to the provisions of Section 8 of Article I of the Constitution of the United States; and the decision of the Supreme Court of Iowa, we submit, is in accord with the applicable decisions of this court and this court should exercise its discretion and deny said writ.

It appears from the petition for a writ of certiorari and the opinion of the Supreme Court of Iowa, whose decision is sought to be reviewed, that every single transaction resulting in a purchase from and sale at respondent's mail order houses located in the states of Illinois, Minnesota and Missouri to residents of the State of Iowa, is a transaction in interstate commerce. As we have pointed out, the inception of such transaction is the sending of an order by United States mail from Iowa to such other state, the remittance of the purchase price by United States mail from Iowa to such other state, the acceptance of such order in such other state, and the shipment of the tangible personal property either by United States mail or other public carrier across the state line into Iowa. Although the right of respondent to engage in such interstate business does not exist because of any authority from the state of Iowa, nevertheless, by Section 8 of said act, it is required *"at the time of making such sales"* to collect the tax imposed by the act.

The interstate character of the mail order business has been specifically recognized by this court.

Heyman v. Hayes, 236 U. S. 178; 59 L. ed. 527.

See also—

Montgomery, Ward & Co. v. Fry (Michigan), 209 N. W. 166.

As we have pointed out, it further so appears that respondent performed no activity and exercised no dominion or control over the subject of said mail order transactions after the same had reached the State of Iowa. In actual practical effect said Iowa Use Tax Act, as construed and administered by petitioners, imposes a tax upon respondent's mail order transactions so performed in interstate commerce measured by a percentage of the gross purchase price.

While sustaining the principle that delivery by the seller within a state immediately following interstate transportation, is an event or incident investing such state with jurisdiction for tax and regulatory purposes, this court, in *McGoldrick v. Berwind-White Coal Mining Co.*, ... U. S. ..., 84 L. ed. Adv. Sheet 343, reiterated but distinguished the proposition that a state tax upon receipts derived from interstate commerce is an infringement of the commerce clause, stating:

> "It is true that a state tax upon the operations of interstate commerce measured either by its volume or the gross receipts derived from it has been held to infringe the commerce clause, because the tax if sustained would exact tribute for the commerce carried on beyond the boundaries of the taxing state, and would leave each state through which the commerce passes free to subject it to a like burden not borne by intrastate commerce. See *Western Live Stock v. Bureau of Revenue, supra* (303 U. S. 255, 82 L. ed. 827, 58 S. Ct. 546, 115 ALR 944); *Gwin, White & Prince v. Henneford, supra* (305 U. S. 439, 83 L. ed. 276, 59 S. Ct. 325)."

In the case of *Gwin, White & Prince v. Henneford*, 305 U. S. 434, 439, 83 L. ed. 272, 276, the opinion states:

> "But it is enough for present purposes that under the commerce clause, in the absence of congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to the activities carried on within the state * * * burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject."

But it is firmly established by controlling decisions of this court that under facts such as here disclosed the State of Iowa is without power to impose such a burden or to impair or regulate the free flow of such interstate commerce.

In *Puget Sound Stevedoring Co. v. Tax Commissioner*, 302 U. S. 90, 82 L. ed. 68, the court had under consideration a statute of the State of Washington which imposed a tax for the privilege of engaging in business activities within the state at the rate of ½ of 1% of the gross income from such business. The Puget Sound Stevedoring Company entered into a contract for the loading and discharging of vessels which were engaged in interstate and foreign commerce, and the court held that the performance of such work by a stevedore was as indispensable an agency of commerce as a ship-owner or master, and therefore that such work constituted interstate commerce. In holding that the Washington statute contravened the provisions of Section 8 of Article I of the Constitution of the United States, the court, speaking by Mr. Justice Cardozo, said:

"The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling. *Philadelphia & S. Mail S. S. Co. v. Pennsylvania,* 122 U. S. 326, 341, 342, 30 L. ed. 1200, 1203, 1204, 7 S. Ct. 1118, I Inters. Com. Rep. 308; *Leloup v. Port of Mobile,* 127 U. S. 640, 32 L. ed. 311, 8 S. Ct. 1380, 2 Inters. Com. Rep. 134; *Galveston H. & S. A. R. Co. v. Texas,* 210 U. S. 217, 52 L. ed. 1031, 28 S. Ct. 638; *Crew Levick Co. v. Pennsylvania,* 245 U. S. 292, 62 L. ed. 295, 38 S. Ct. 126; *Matson Nav. Co. v. State Bd. of Equalization,* 297 U. S. 441, 444, 80 L. ed. 791, 794, 56 S. Ct. 553; *Fisher's Blend Station v. Tax Commission,* 297 U. S. 650, 655, 80 L. ed. 956, 959, 56 S. Ct. 608."

In *Fisher's Blend Station v. Tax Commission,* 297 U. S. 650, 80 L. ed. 956, the court had under consideration a statute of the State of Washington which imposed an occupation tax measured by gross receipts from a radio broadcasting station, the broadcasting waves of which were projected across state lines, and in an opinion by Mr. Justice Stone the court held:

"As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce. *Philadelphia & S. Mail S. S. Co. v. Pennsylvania,* 122 U. S. 326, 30 L. ed. 1200, 7 S. Ct. 1118, I Inters. Com. Rep. 308; *Leloup v. Mobile,* 127 U. S. 640, 32 L. ed. 311, 8 S. Ct. 1380, 2 Inters. Com. Rep. 134; *Galveston H. & S. A. R. Co. v. Texas,* 210 U. S. 217, 52 L. ed. 1031, 28 S. Ct. 638; *Crew Levick Co. v. Pennsylvania,* 245 U. S. 292, 62 L. ed. 295, 38 S. Ct. 126."

In *Crew Levick Co. v. Pennsylvania,* 245 U. S. 292, there was involved a state tax upon the business of selling goods in foreign commerce measured by gross receipts for goods so sold and shipped, and such tax was pronounced an im-

post upon exports and therefore without the power of the state to lay because of the provisions of Section 8 of Article I of the Constitution of the United States investing the Congress with exclusive power to regulate foreign commerce. In the course of the opinion, the court said:

> "Nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise. It operates to lay a direct burden upon every transaction in commerce by withholding for the use of the State a part of every dollar received in such transactions."

In *Adams Mfg Co. v. Storen*, 304 U. S. 307, 82 L. ed. 1365, there was involved a statute of Indiana laying a gross receipts tax upon all sales of a manufacturing company located in that state. In an opinion by Mr. Justice Roberts, the court held that such tax constituted an unlawful burden upon interstate commerce and violated Article I, Section 8 of the Federal Constitution, and said:

> "We conclude that the tax is what it purports to be,—a tax upon gross receipts from commerce. Appellant's sales to customers in other states and abroad are interstate and foreign commerce. The Act, as construed, imposes a tax of one percent on every dollar received from these sales.
>
> The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Section 8 of the Constitution. The opinion of the State Supreme

Court stresses the generality and nondiscriminatory character of the exaction but it is settled that this will not save the tax if it directly burdens interstate commerce."

The Supreme Court of Iowa referring to certain decisions relied upon by petitioners and making a special reference to the case of *McCarroll v. Dixie Greyhound Lines*, 60 S. Ct. 504, 506, 84 L. ed. 441 (Record 146-148), decided February 12, 1940, held that the State of Iowa was without power in the enactment of the Iowa Use Tax Act to impose a tax upon the interstate transactions represented by respondent's mail order sales consummated at its mail order establishments outside the State of Iowa, since such would constitute a burden upon and regulation and impairment of the free flow of interstate commerce.

In the light of undisputed facts heretofore set forth, we submit that the Supreme Court of Iowa properly held the provisions of the Iowa Use Tax Act as applied to the transactions involved in this case, invalid inasmuch as such provisions, in accordance with the applicable decisions of this court, are in effect a regulation of, and burden upon interstate commerce, and that therefore this court should exercise its sound judicial discretion and deny the writ.

We respectfully submit that for the reasons above set forth, the writ of certiorari should be denied.

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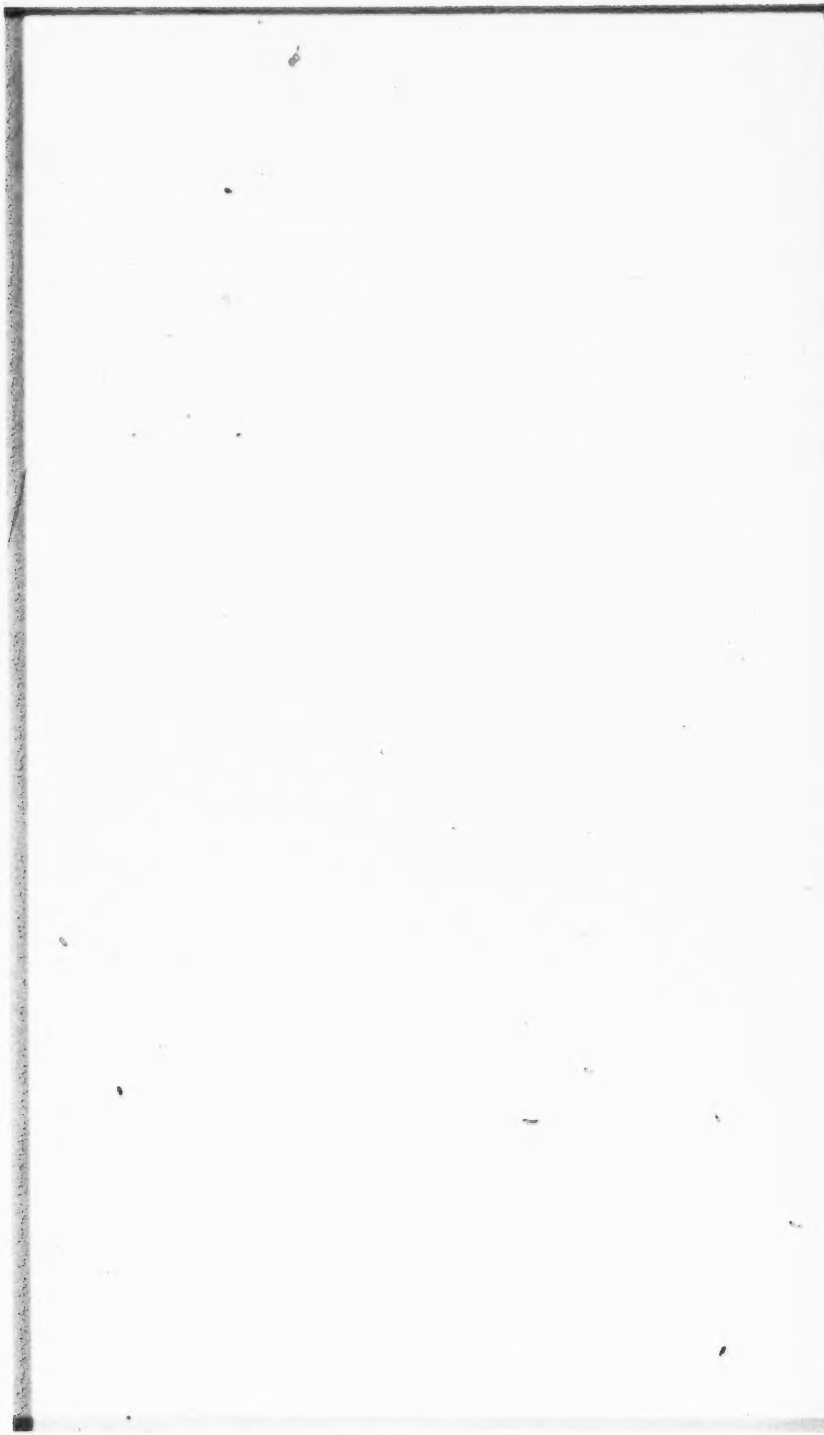

FILED
AUG 31 1940
CHARLES ELMORE CROPLEY
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Supreme Court of the United States

October Term, 1940.

No. 256

LOUIS E. RODDEWIG, AS CHAIRMAN OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY; D. L. MURROW AND C. FRANK GREEN, AS MEMBERS OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY,

Petitioners,

vs.

MONTGOMERY WARD & CO., INCORPORATED,

Respondent.

RESISTANCE TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1940.

No. 256

LOUIS E. RODDEWIG, AS CHAIRMAN OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY; D. L. MURROW AND C. FRANK GREEN, AS MEMBERS OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY,

Petitioners,

vs.

MONTGOMERY WARD & CO., INCORPORATED,

Respondent.

RESISTANCE TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Opinions Below

The opinion of the Iowa Supreme Court in this case (No. 256) is reported in 292 N. W. 142. The opinion in the *Sears, Roebuck* Case (No. 255) is reported in 292 N. W. 130.

Statement of the Case

The Petition for Writs of Certiorari filed in these cases relates to two separate suits for injunction tried at different times, argued on separate briefs, and decided on independent records. The Petition does not distinguish between the two cases.

Montgomery Ward & Co., Incorporated, respondent in this case, submits that the grounds advanced in the Petition are not sufficient to require review of the judgment of the Supreme Court of Iowa as to it. The position taken by this respondent differs in some respects from that taken by the respondent in No. 255. The difference arises in part from differences in the record. We respectfully submit that the considerations herein advanced, considered independently, show that this case is not one as to which this Court would desire to exercise its discretionary power of review.

The petitioners' "Summary Statement" of the facts omits certain facts very important to a proper understanding of the issues presented in this case.

The Iowa Use Tax Act requires retailers maintaining a place of business in Iowa and making sales of tangible personal property for use in the state to collect the tax imposed "at the time of making such sales, *whether within or without the State.*" (Section 6943-109, Code of Iowa, 1939—italics added.) By its express wording, the statute thus compels the performance of an act outside the state.

This respondent makes two types of sales which are affected by this requirement of tax collection:

1. sales made to Iowa customers by mail from mail order houses located outside the state of Iowa;
2. sales made to Iowa customers by retail stores located outside of Iowa, some of which are near the borders of Iowa.

The Petition says nothing about this second type of sale, although eight of the nine justices of the Iowa Court agreed that the collection provisions of the Iowa Use Tax Act were unconstitutional as to them. (See pp. 153 and 154, record in No. 256.)

Furthermore, the Petition omits to point out that this respondent collected and returned the Iowa Use Tax with respect to "sales made by order offices" in the state of Iowa as well as with respect to mail order sales "with which their stores located in the State of Iowa had had some connection" (p. 63 of the record in No. 256). The respondents sought an injunction only against being compelled to do more. The Petition thus fails to point out that the questions in this case arise as to acts of the respondent which are totally unconnected with any acts performed within the State of Iowa.

The position taken by the Petitioners, when stated succinctly, is this:

1. The Supreme Court of Iowa improperly held that the collection and payment provisions of the Iowa Use Tax Law operated extra-territorially and for this reason fell within the prohibitions of the Fourteenth Amendment to the Constitution; such a holding conflicts with the decisions of this Court in *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62, and *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86.

2. The Supreme Court of Iowa improperly held that the collection and payment provisions of the Iowa Use Tax Law burdened interstate commerce in such a manner as to offend against section 8 of Article I of the Constitution of the United States; such a holding conflicts with a number of decisions of this Court, including *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33.

This resistance is designed to show:

1. That the first contention is unsound because the principle of constitutional law invoked by the Iowa Court is unchallenged, the statute admittedly offends against this principle on its face, its application to the facts of this particular case would obviously amount to a projection of Iowa's regulatory powers into other states, and the facts are entirely different from those involved in the *Felt & Tarrant* and *Monamotor* cases.

2. That the second contention is unsound because the Supreme Court of Iowa did not find it necessary to determine whether the statute was invalid under the commerce clause.

We shall, for the purpose of clarity, discuss the second contention first.

I. The Validity Of The Collection And Payment Provisions Of The Iowa Use Tax Act Under Section 8 Of Article I Of The Constitution Of The United States Was Not Determined By The Supreme Court Of Iowa.

In the attempt of the petitioners to show some possible doubt as to the correctness of the Iowa Supreme Court's decision, the statement is made that this decision

> "held that the collection and payment provision of the Iowa Use Tax Law as applied to the corporations' mail order businesses constituted a violation of Section 8 of Article I of the Constitution of the United States." (Petition, p. 6)

This statement is entirely misleading. The question of burden on interstate commerce was not one upon which the Supreme Court of Iowa found it necessary to pass. The majority opinion simply held:

> "From any reasonable or practical standpoint, the amount of the tax being made a debt of plaintiff, the statute at least constitutes regulation of plaintiff's activities outside the state as a condition to it being granted a license to do business in the state. This cannot be done." (P. 136, record in No. 255)

This statement of the Court's conclusion is followed and fortified by quotations from nine decisions of this Court, none of which refer to the placing of a burden upon interstate commerce, and every one of which upheld the principle that a state cannot "project its legislation" into other states. *(Cf., Baldwin* v. *Seelig,* 294 U. S. 511, at p. 521.) Following this discussion, the Court restated the basis of its decision:

> "But it (the state of Iowa) has no power to regulate plaintiff's activities outside this state, nor has it the power to regulate such activities as a condition to plaintiff's right to continue to do business here." (P. 142 of the record in No. 255)

The prohibition against the enactment by state legislation of extraterritorial laws derives from the general nature of the Constitutional system and is reinforced by the due process clause of the Fourteenth Amendment. It does not arise in the commerce clause, and applies equally to regulation of extraterritorial activities which are not in, or connected with, interstate commerce, such as this respondent's retail sales in stores outside Iowa.

Following its discussion of these nine governing precedents, the Supreme Court of Iowa proceeded to analyze six cases cited by the attorney-general, pointing out that the six decisions, including *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33, "do not involve the question that confronts us." (P. 146, record in No. 255)

The opinion concludes with citations from *McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176, the only case cited as a precedent which involved the commerce clause. As to it, the opinion says:

> "While the question presented in the case last quoted from is different from the question that now confronts us, it seems apparent that the decision there made was prompted by some of the principles of law which are recognized and applied in the precedents which we deem controlling here." (Pp. 147-148, record in No. 255)

This precedent was invoked solely as testimony of the current acceptance of the principles behind the nine cases originally cited.

Although the Supreme Court of Iowa might have based its decision upon a conflict between the Iowa Use Tax Act and Section 8 of Article I of the Constitution, the opinion thus shows that the Court did not do so. The Iowa Court clearly found it unnecessary to determine any issues under the commerce clause. While arguments based on the commerce clause might add further support to the Iowa Court's decision, they could not conceivably result in a reversal of that decision. Such arguments would be pertinent only if the decision below cannot be sustained on the reasoning advanced by the state court.

The decision of the Iowa Supreme Court does not call for review by this Court on any supposed ground of inconsistency with decisions interpreting the commerce clause. Therefore Point III of petitioners' Argument, including all the text from the middle of page 15 to the Summary, is totally irrelevant.

II. The Decision Of The Iowa Court As To The Extra-Territorial Effect Of The Collection And Payment Provisions Of The Iowa Use Tax Act Is Not Only Patently Correct On The Basis Of The Record In This Case, But Involves No Possible Conflict With The *Felt & Tarrant* And *Monamotor* Cases.

The supposed conflict between the decision of the Iowa Court in this case and the two decisions of this Court cited by the Petitioners disappears quickly when the issues and the facts are stated simply. First, however, a brief demonstration of the patent soundness of the opinion below may help to define the problem presented by the record.

A. The Decision Below Was the Only Logical One Which Could Be Made Upon the Facts Presented to the Court.

Upon the record made by this respondent, we submit that the decision of the Supreme Court of Iowa was so obviously correct as to justify no formal review by this Court.

1. The Petition raises no doubts as to the principle of law followed by the Iowa Supreme Court, but questions only the application of the principle to the facts of the present case.

The Petition emphasizes the monetary results of the decision of the Iowa Supreme Court to the State of Iowa as showing the supposed importance of the case. The Petition does not, nor could it, pretend that any novel or questionable principle of constitutional law was involved.

The constitutional principle considered by the Iowa Supreme Court to be controlling was the principle that a

state may not, under any disguise, seek to regulate the conduct either of business or of personal affairs outside the boundaries which mark the limits of state power. To do so would infringe upon the independent sovereignty of its fellow members in the Federal Union. This principle was restated recently with reference to the taxing power:

> "Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere."
>
> *Conn. Gen. Life Ins. Co.* v. *Johnson*, 303 U. S. 77, at p. 80.

This statement of the principle was quoted in the opinion of the majority of the Iowa Supreme Court. The main dissent said with respect to it:

> "We have no quarrel with the *Johnson* case." (P. 155, record in No. 255)

The position of the petitioners before this Court is the same, for under Point II of their Brief in support of their Petition—the only portion of the Brief relating to the real issue—they say:

> "We do not feel that anything can be added by way of argument to the statements made by Chief Justice Hamilton in the dissenting opinion in the *Sears, Roebuck* case." (Petition, p. 14)

The Petition simply presents to this Court the question whether an unchallenged principle of constitutional law was correctly applied to the particular facts which the case presents.

2. The collection and payment provisions of the Iowa Use Tax Act are admittedly invalid when literally applied and the petition in effect asks this Court to rewrite the statute.

The Iowa Use Tax Act compels every retailer doing business in Iowa to collect the use tax in connection with every sale made by it "at the time of making such sales, whether within or without the state". (Section 6943-109, Code of Iowa, 1939) Thus the duty of collection must be performed *at the time* a sale is made to an Iowa customer, even if the sale is made *without the state.*

No language could more clearly impose the duty of performing an act outside the state. The collection and payment provisions of the Iowa Use Tax Act are an open and undisguised attempt by the legislature of Iowa to project the power of the State of Iowa beyond its boundaries.

The Supreme Court of Iowa properly interpreted these provisions of the Iowa Use Tax Act as applying to such sales as those made by the respondent to Iowa customers at out-of-the-state retail stores. Eight of the nine justices of the Iowa Court agreed that the statute is clearly unconstitutional as applied to such sales. *The Petition does not raise any question as to the correctness of the decision below holding the statute unconstitutional when so applied.* The Petitioners thus admit that the challenged statute is unconstitutional as written.

The challenged provisions of the statute are not on their face separable between their application to out-of-the-state retail store sales and to out-of-the-state mail order sales. Under normal rules of constitutional law, the challenged provisions would thus be void in their entirety. What the Petition does, in effect, is to ask this Court to rewrite the challenged sections of the statute to make

them apply only to some of the sales made by this respondent to Iowa customers. (Footnote 1)

3. **The Supreme Court of Iowa was clearly correct in holding that any statute directed against the type of sales covered by this respondent's petition for injunction would operate extraterritorially.**

Since, in effect, this Court must redraft the statute if the petitioners' request be granted, the issue is somewhat different than if associated with a legislative finding of fact directed to the specific situation before this Court. Here no legislative finding has been made that all mail order sales require uniform treatment, or that practical reasons of administration prevent the analysis of out-of-the-state mail orders to discover those as to which some related act is performed within Iowa as distinct from those which are wholly extraterritorial. The issue is simply whether the specific type of sales covered by the issues were in any way within the jurisdiction of Iowa.

The statute cannot be saved by speculations as to what the respondent *might* have done within the boundaries of Iowa as to its mail order sales; the question is whether it *did* anything within the state of Iowa as to the sales of the type specifically covered by its petition for an injunction.

The issues arose under an injunction sought against the threat of the petitioners to cancel the respondent's license to do business unless it collected the use tax with

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Footnote 1: The right of this Court to do so exists, if at all, solely because of a broad separability clause added to the Use Tax Act by the legislature, but not reprinted in the Iowa Code:

"If any section * * * of this act or the application thereof to any person or set of circumstances is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this act, or its application to any other person or set of circumstances. * * *"

(Sec. 27, S. F. 317, Acts of the 47th Gen. Assembly of Iowa—italics added.)

reference to sales as to which it was not then collecting and reporting the tax. All fact situations arising from sales as to which the respondent had collected and reported the use tax were thus excluded from the issues.

The tax had been collected and reported by this respondent as to all mail order sales solicited through order offices within the state of Iowa or as to which retail stores within the state "had had some connection" (p. 63 of the record in No. 256). The issues of this case therefore cover only sales not solicited within Iowa and as to which the retail stores had nothing to do. We submit that such sales were patently and obviously outside the jurisdiction of Iowa.

This conclusion is strengthened by the following uncontradicted testimony:

> "No employee of the mail order house lives within the State of Iowa and there are no acts done within the State of Iowa in regard to any of the orders sent to the mail order house. The company has no means of collecting any amounts or sums, or any machinery presently set up for collecting any sums from Iowa customers by individuals within the State of Iowa. * * *" (Pp. 49-50, record in No. 256)

The facts actually shown by the record do not permit any claim that the Supreme Court of Iowa wrongfully applied to the facts before it the unchallenged principle of constitutional law upon which its decision was predicated. The petitioners were left free by the decision below to apply the collection provisions of the Use Tax Act to sales which were, as a matter of fact, within Iowa's jurisdiction. The decision below was thus on its face just and correct, and does not call for the discretionary exercise of this Court's power of review.

B. The Decision of the Iowa Supreme Court Did Not Conflict With Any Decision of This Court.

The Brief attached to the Petition asserts a conflict on the point of extraterritoriality with only two decisions of this Court:

Monamotor Oil Co. v. *Johnson*, 292 U. S. 86

Felt & Tarrant Mfg. Co. v. *Gallagher*, 306 U. S. 62

The asserted conflict is entirely absent. In neither case did the fact situation permit any claim of extraterritoriality. In fact, in neither case was any resort to the principle upon which the Iowa Supreme Court relied made by counsel.

The *Monamotor* case involved two types of transactions: first, shipments of gasoline purchased outside the state to the *Monamotor* company itself within the state and there sold by it; second, shipments from points in Oklahoma direct to customers of *Monamotor* in Iowa. The part of the decision of this Court in the *Monamotor* case with which the present case is supposed to conflict begins a few sentences before the end of page 94 of 292 U. S., fills nearly half of page 95, and ends with the following clause quoted by the dissenting opinion in the present case:

> "* * * and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant."

This passage relates, as the opening sentence makes clear, to the shipments direct from Oklahoma to customers in Iowa. But these shipments were made to those customers "upon their orders taken in Iowa, and the gasoline to fill such orders was shipped direct from Oklahoma." (Pp.

78 and 79 of the Brief of Appellant in the *Monamotor* case before this Court)

The *Monamotor* case thus referred to sales comparable to those made by respondent's order offices in Iowa, as to which respondent has collected the use tax, and which are not in issue in the present case.

The *Felt & Tarrant* case similarly was concerned only with sales made upon orders solicited by agents of *Felt & Tarrant* within the boundaries of California, the state levying the Use Tax.

The total irrelevance of these two decisions to the facts of the present case needs no further illustration.

Furthermore, nothing in the opinion of this Court in either of these two cases relates to the issue presented by the present case. This Court obviously never intended to indulge in idle discussion of an issue not before it. The asserted conflict exists neither in the result nor the reasoning.

CONCLUSION.

This is not a case which calls for the exercise of this Court's discretionary power of review. The Supreme Court of Iowa adopted and applied a principle of constitutional law which is not challenged by the petitioners. The statute held invalid was admittedly so when literally applied. The fact situation presented to the Supreme Court of Iowa was obviously one where the State of Iowa had no jurisdiction. Neither the result nor the reasoning conflicts in any way with any decision of this Court. We submit that the Petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 255.

LOUIS E. RODDEWIG, as Chairman of the Iowa State Board of Assessment and Review, etc., et al.,
Petitioners,

vs.

SEARS, ROEBUCK AND CO.,
Respondent.

BRIEF OF RESPONDENT.

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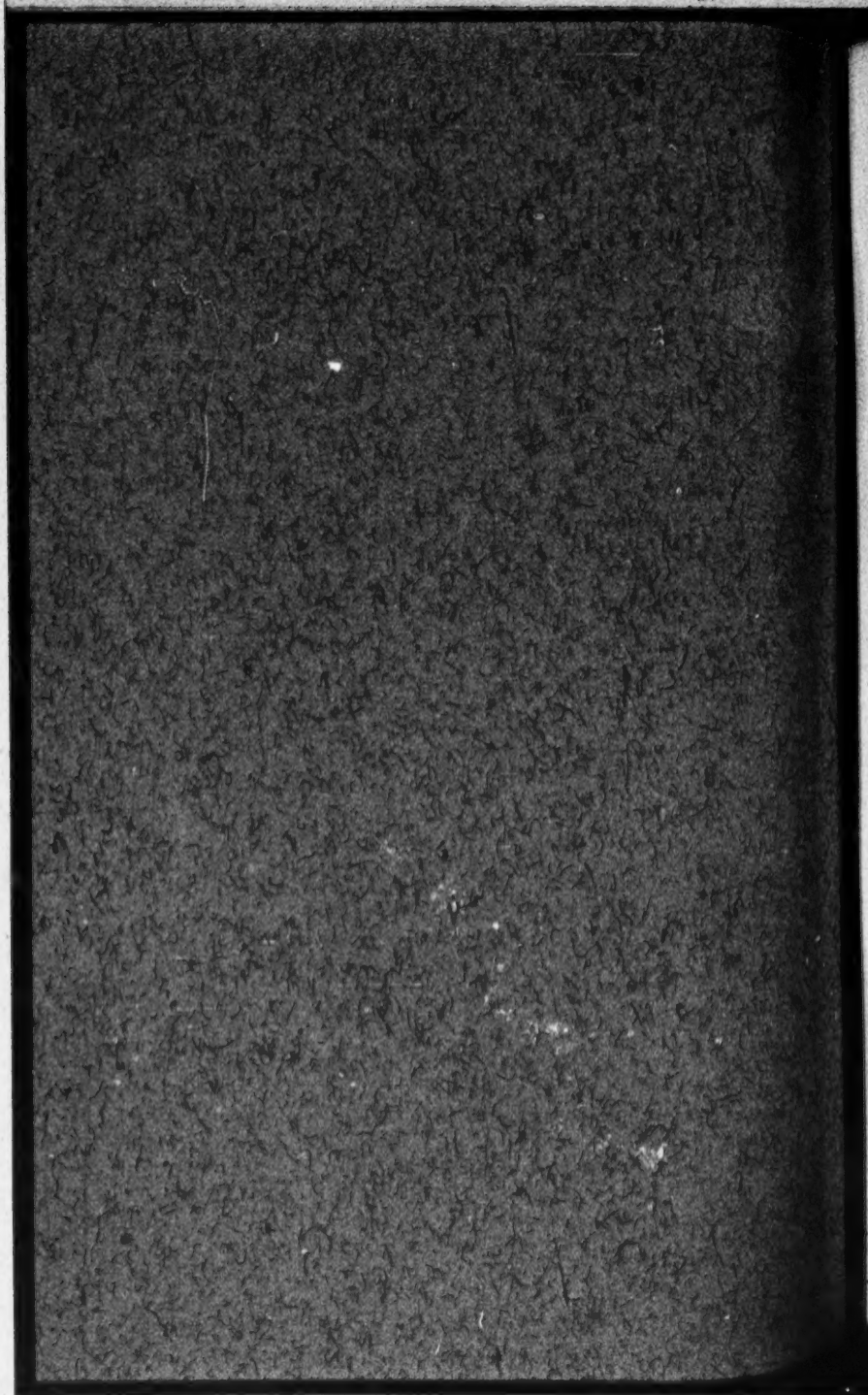

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 255.

LOUIS E. RODDEVIG, as Chairman of the Iowa State Board of Assessment and Review, etc., et al.,
Petitioners,

vs.

SEARS, ROEBUCK AND CO.,
Respondent.

BRIEF OF RESPONDENT.

Opinion of the Court Below.

The opinion of the Supreme Court of Iowa in this case is reported in 292 N. W. page 130 and appears also in the printed transcript of record on pages 88 to 102, inclusive.

STATEMENT OF THE CASE.

The Issues.

This suit sought to enjoin the petitioners, as members of the Iowa State Board of Assessment and Review, from enforcing as against respondent, Sears, Roebuck and Co., insofar as its purely interstate mail order sales to residents of Iowa are concerned, the provisions of Chapter 198 of

the Laws of the Forty-seventh General Assembly of Iowa which also appear as Chapter 329.4 of the Code of Iowa 1939, commonly known and hereinafter referred to as the "Iowa Use Tax Act"; and also from taking steps to cause the revocation of its permit to do business within the State of Iowa as a foreign corporation or to cancel licenses which had been issued to it as a retail merchant in connection with the operation of its twelve retail stores in Iowa.

The petition (R. 1-24) was based upon the claim that the Iowa Use Tax Act as applied to the interstate mail order business of respondent operated extra-territorially and regulated activities of respondent performed wholly without the confines of the State of Iowa and imposed in legal effect a tax upon the gross receipts of respondent from merchandise sales completely consummated outside the state, and was therefore unconstitutional and void because in contravention of the provisions of the Constitution of the United States and particularly of the Fourteenth Amendment thereto which provides that no state shall deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the law; and, further, that said act as applied to the interstate mail order business of respondent burdened and impaired the free flow of interstate commerce, contrary to the provisions of Section 8 of Article I of the Constitution of the United States which invests the Congress with exclusive power to regulate commerce with foreign nations and among the several states.

The petitioners' answer (R. 26-35) claimed that the act, when construed together with the Iowa Sales Tax Act, imposed no burden upon interstate commerce and was not otherwise unconstitutional.

How the Issues Were Decided.

The State District Court, pursuant to an opinion announced on December 21, 1938 (R. 62), granted a permanent injunction in accordance with the prayer of the petition (R. 80). The opinion of the District Court found that the challenged provisions of the Iowa Use Tax Act, as applied to the interstate mail order sales of respondent to residents of the State of Iowa, offended the due process clause of the Fourteenth Amendment to the Constitution of the United States, as well as the Commerce Clause thereof.

An appeal from such judgment was prosecuted by petitioners to the Supreme Court of Iowa and that court on May 14, 1940 rendered its decision (R. 88) finding and holding that the said Iowa Use Tax Act as construed and administered by petitioners constituted a regulation of its activities outside the state and was therefore violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and, further, that said act as construed and administered by petitioners and as applied to the mail order business of respondent, whose activities in connection therewith were performed wholly without the State of Iowa, constituted a regulation of and substantial burden upon and impairment of the free flow of interstate commerce contrary to the provisions of Section 8 of Article I of the Constitution of the United States.

Pertinent Provisions of the Act.

Certain provisions of Chapter 329.4, Code of Iowa, 1939, commonly known as the Iowa Use Tax Act, as applied to respondent's mail order business, are here involved. These provisions are reflected in Section 6943.109, which provides that retailers maintaining a place of business in the state and making sales of tangible personal property for use in the state "shall at the time of making such sales, *whether*

within or without the state, collect the tax imposed * * *". (Italics ours)

Section 6943.112 provides that "the tax herein required to be collected by any retailer pursuant to Section 6943.109 * * * shall constitute a debt owed by the retailer to this state".

Section 6943.122 provides that whenever the retailer maintaining a place of business in Iowa is a foreign corporation authorized to do business in Iowa, and said corporation fails to comply with the provisions of the Act, then the corporation's permit to do business in Iowa as a foreign corporation shall be revoked, and also its licenses as a retail merchant may be canceled.

Statement of Facts.

Respondent, Sears, Roebuck and Co., is a corporation organized under the laws of the State of New York with its principal operating office in the city of Chicago, Illinois, and is engaged in the business of retail merchandising (R. 1, 26).

In 1928 respondent applied for a permit to do business in the State of Iowa as a foreign corporation and such permit was issued to it and has never been revoked (R. 2, 3, 26). In connection with the application for such permit to do business as a foreign corporation, respondent paid to the Secretary of the State of Iowa the sum of $50.00 (R. 2, 26), and subsequently respondent reported increases in the amount of its capital employed in the State of Iowa and paid to the Secretary of State substantial sums on account thereof (R. 3, 26).

After the issuance of said permit to transact business as a foreign corporation, respondent commenced to conduct a retail merchandising business in the State of Iowa by opening and operating at twelve separate points retail de-

partment stores wherein it sells extensive lines of merchandise (R. 3, 26).

Such retail stores in Iowa are classified with reference to size and types of merchandise carried. There is one A. store, which is the largest store and carries a complete line; seven B-1 stores, and four B-2 stores (R. 55).

Respondent entered into long-time leases covering the locations in which it conducts said retail business, all of which extend for a substantial period of years. The majority of the leases for the larger stores within the State of Iowa are for periods of ten to twenty years, and all of said leases have a number of years yet to run. Said leases are not subject to cancellation, and respondent is obligated to continue payments of rental thereunder (R. 3, 26).

Respondent has expended large sums of money in equipping said stores with furniture, fixtures and appliances necessary for the conduct of retail department stores, and has stocked said stores with extensive lines of merchandise. Its investment in furniture, fixtures, equipment and stocks in the State of Iowa exceeds the sum of $500,000.00, and its liability upon the unexpired terms of leases entered into amounts to many thousands of dollars (R. 3, 26).

After the passage of Chapter 196 of the Laws of the Forty-seventh General Assembly, known as the "Iowa Retail Sales Tax Act", respondent applied for and procured from the Iowa State Board of Assessment and Review licenses for each of its said stores, which licenses are in full force and effect (R. 4, 26, 27, 28).

Sales of tangible personal property to persons within the State of Iowa at the said twelve retail stores of respondent are made in two methods (R. 36).

First:

Type 1. DIRECT SALES. Sales made in its retail stores located within the State of Iowa of such property out of the stock of said store, payment therefor being made to

said store by the purchaser, and such sales being subject to the Iowa Sales Tax.

Respondent has collected the retail sales tax on account of said direct sales and paid the same, in accordance with the Iowa Retail Sales Tax Act, to the State of Iowa (R. 4, 26, 27, 28).

Second:

Type 2. SPECIAL ORDER—SHIP DIRECT SALES. This method of sale is followed where a purchaser orders from one of respondent's retail stores in Iowa tangible personal property which is not carried by the store in stock, but which is carried by one of respondent's mail order establishments located outside of the State of Iowa. In this type of sale the order for the purchase is given to the local store, and payment therefor, including transportation charges from the shipping point, is made to the local store. The local store then orders shipment of the goods purchased to be made directly to the purchaser from one of respondent's mail order establishments; and the mail order establishment fills the order, charging the local store with the cost price of the goods, plus an amount to cover overhead expense in handling and shipping, plus the actual transportation charges. The purchase price paid to and received by the local store is retained by it and included in the volume of its gross sales.

* * * * *

On June 2, 1938 respondent made to the Iowa State Board of Assessment and Review Retailers' Use Tax Returns for the quarterly periods ending June 30, 1937, September 30, 1937, December 31, 1937, and March 31, 1938; and at the same time paid to said Board the sum of $7,853.02. Said returns purported to show, and the sum of money thus paid purported to be, the correct amount of the use tax exacted under the terms and provisions of the Iowa Use

Tax Act for the periods mentioned in said returns, for sales of tangible personal property identified as Type 2, Special Order—Ship Direct Sales, and also the use tax exacted on account of tangible personal property purchased by respondent outside the State of Iowa but used by it within the State of Iowa and subject to the Iowa Use Tax Act (R. 38). The aggregate sales of respondent's retail stores located in the State of Iowa in the year 1936 amounted to $5,080,000.00, and for 1937, $5,600,000.00 (R. 60).

Respondent also maintains certain establishments where sales are made by the mail order method. It has such mail order stores in Chicago, Illinois, Minneapolis, Minnesota and Kansas City, Missouri, but no mail order stores in Iowa (R. 55). In the conduct of its mail order business, respondent mails catalogs to prospective purchasers, and in 1937 mailed to residents of the State of Iowa approximately 600,000 small catalogs and 427,000 large catalogs (R. 55, 84). Respondent also mails bulletins soliciting orders (R. 55), and the mailing of these catalogs and bulletins is the sole means of respondent for securing said mail order business (R. 84).

In making said mail order sales, respondent follows the following method:

Type 3. MAIL ORDER SALES (R. 37).

In this type of sale the purchaser, a resident or person in Iowa, after preparing his order or having it prepared for him, sends to one of respondent's mail order establishments located outside of Iowa a written order for the purchase and delivery to him in Iowa of one or more items of tangible personal property listed and priced in respondent's mail order catalogs, the order being accompanied by the remittance of the purchase price plus transportation charges, and the means of transportation being customarily specified by the purchaser. The order is accepted or rejected, as the case may be, at the mail order establishment of respondent which received the order; and if the order is accepted it is

filled by the direct shipment of the property purchased from said mail order establishment to the purchaser in the State of Iowa, delivery being accomplished through the United States mails or some common carrier of goods, such as specified by the purchaser.

The merchandise carried in the mail order stores differs from the merchandise carried in the retail stores in the range of items and character of merchandise carried (R. 55). Respondent carries approximately 59,000 items in the mail order stores and an A. retail store would carry about 19,000 items, and a B-1 retail store would average about 12,000 items and a B-2 retail store about 9,000 items (R. 56). The smaller the retail store the larger the proportion of items carried is the same as the mail order items. In a B-2 store approximately 70% of the said 9,000 items would be the same as respondent quotes in the catalog; in the B-1 store approximately 60% of the said 12,000 items, and in the A. store, such as that located in Des Moines, probably 45% of the said 19,000 items would be the same (R. 56). None of the stores which respondent has in Iowa contains sufficient space to successfully carry on therein a mail order business. The retail store located in Iowa gains no benefit and the manager's earnings are not affected by business coming from orders mailed by customers from Iowa to the mail order plants (R. 57). Respondent prepares merchandise lists which are sent to the retail stores in Iowa (R. 56) from which each individual store makes its selections of the items it will carry in that store (R. 84, 85). Most orders which are received in the mail order houses from residents of the State of Iowa (R. 85) contain more than one item, and it would be impossible for a retail store to fill more than an exceedingly small percentage of the multiple item orders (R. 56).

Respondent receives a large number of mail orders each day and puts them through its mail order plants on a time

schedule, and there is no allowance or arrangement for withholding orders from their schedule. It would substantially increase the cost of operating respondent's business to hold such orders in suspension and would require a major rearrangement of the character of the business (R. 57). Respondent endeavors to get out 100% of the orders the same day as received and comes within a small percentage of accomplishing this. Price and speed of delivery are all-important in the mail order business (R. 59).

Respondent does not keep any individual account of mail order shipments to residents of the State of Iowa from the three plants located outside of the state. The approximate amount of those sales in a given year can be arrived at, however, by what is termed the "advance cash ratio" (R. 59, 60). Using the advance cash ratio method, the amount of mail order sales in Iowa shipped from the Chicago, Kansas City and Minneapolis stores for the year 1937 was approximately $5,400,000.00. Of that amount $2,280,000.00 represented shipments from the Chicago plant, $1,140,000.00 from the Kansas City plant, and $2,000,000.00 from the Minneapolis plant (R. 60). In 1936 mail order sales to Iowa customers from the Chicago mail order house were $2,400,000.00, from the Kansas City mail order house $1,200,000.00 and from the Minneapolis mail order house $2,250,000.00 (R. 60). The aggregate of the three was approximately $5,900,000.00 (R. 87). Based on the general catalog distribution there were some 300,000 customers of respondent's mail order houses (R. 60), in the State of Iowa (R. 87), and in the year 1937 there were approximately 1,200,000 orders received from Iowa customers (R. 60).

Spiegel's, Incorporated, located in Chicago, Illinois, is engaged in the mail order business selling household furniture and wearing apparel. That company distributes catalogs to prospective customers twice a year and such catalogs are sent to people who are residents of Iowa (R. 54),

and it has been doing so for many years (R. 84). That company maintains no place of business within the State of Iowa but gets its orders by mail from customers, delivering to purchasers mainly through parcel post or freight. All shipments are made from Chicago, the company's only place of business. During the past year sales made to Iowa residents by Spiegel's, Incorporated amounted to approximately one and a quarter million dollars upon which no use tax was collected (R. 54, 55). Spiegel's, Incorporated has never made application to be designated as a withholding agent under the provisions of Section 9 of the Iowa Use Tax Act (R. 55).

The Chicago Mail Order House is located in Chicago and engaged in the mail order business and it likewise distributes catalogs and its business is conducted under the usual mail order method (R. 56).

National Bellas Hess Company is located in Kansas City, Missouri and its business is the same as the Chicago Mail Order House (R. 56).

The Jim Brown Fencing Company is located at Adrian, Michigan and it sells by mail order heavy lines such as hardware, mechanical lines, fencing, etc., and it sells by means of catalogs (R. 56).

Neither the Chicago Mail Order House, the National Bellas Hess Company, nor the Jim Brown Fencing Company has any establishments in the State of Iowa, but all are in direct competition with respondent (R. 56).

Neither the Chicago Mail Order House, the National Bellas Hess Company, nor the Jim Brown Fencing Company had registered as a withholding agent under the provisions of Section 9 of the Iowa Use Tax Act (R. 43).

Assuming that neither Spiegel's, Incorporated, nor the Chicago Mail Order House, nor the National Bellas Hess Company, nor the Jim Brown Fencing Company collected 2% of the purchase price for use tax on sales made to resi-

dents of Iowa and the respondent did collect such 2% use tax, then the mail order business of respondent would be seriously impaired through this 2% differential (R. 56, 57).

Illinois has a sales tax and respondent undertakes to collect that tax from its Illinois customers (R. 57, 85), and in so doing respondent includes on the cover of its catalogs a notice to Illinois customers requesting them to include an amount to cover that tax and giving a schedule of the amount required for various amounts of orders. At the beginning, something less than one-half sent any tax at all, and today the percentage has grown from 1933 until approximately 65% of respondent's orders include an allowance for such a tax. Where orders are not accompanied by an amount to cover the sales tax in Illinois, respondent fills the order and sends the customer a "Due Us" slip requesting payment of the difference. It does not hold up the orders as this would be impossible from the standpoint of the operation of the plant (R. 57). Respondent's experience is that it collects not more than 35% of the value of such "Due Us" shortages. Assuming that upon sales to residents of the State of Iowa through mail order the use tax as applied would amount to $100,000.00 per year, then, based upon respondent's experience in the State of Illinois, the maximum amount that could be collected would be around $68,000.00. To do that would entail a direct cost within respondent's business of approximately $13,700.00, and in addition respondent's customers would be subjected to an extra expense in making such remittances (R. 85).

The foregoing statements of cost are predicated upon the assumption that respondent would put a similar notice on its catalogs, which has been described as being used in Illinois, requesting the customer to remit with his order the amount of the tax. If such notice was not placed on the catalog, collections of the use tax on shipments to customers in the State of Iowa would not exceed $35,000.00,

leaving the balance uncollectible, and respondent's cost involved would be approximately $18,000.00 on the assumption that such use tax would amount to approximately $100,000.00 a year (R. 85).

It took respondent five years to reach the 65% of collections of the Illinois tax and it has employed no new technique in the matter of the collection of the tax (R. 58). It is merely the matter of educating hundreds of thousands of people (R. 86).

Ordinarily there is an amount included in the remittances accompanying orders to cover transportation charges on the goods ordered (R. 86). Sometimes the remittance is short, in which event respondent generally does not hold up the shipment but sends along with the shipment a "Due Us" or a "You Owe Us" form for the shortage (R. 60). Respondent has employed this practice in an effort to collect deficiencies of that sort, but has not been able to make all of those collections. Its experience is that approximately of the "Due Us's"——those amounts less than twenty-five cents—respondent receives approximately 36%, whereas of the larger amounts approximately 70 to 75% is collected (R. 86, 87).

Respondent has not collected from the purchasers to whom mail order sales as hereinbefore defined have been or are being made, the so-called use tax imposed by the Use Tax Act of the State of Iowa (R. 37). Respondent concedes as a fact that it is obligated to collect from the purchaser and remit to the State of Iowa either the sales tax or the use tax imposed on all types of sales made by it to residents of or persons within the State of Iowa, excepting on mail order sales hereinbefore defined as Type 3 (R. 38).

On March 20, 1938 petitioners, as members of the Iowa State Board of Assessment and Review, adopted a resolution (R. 10, 26, 18 to 23), advising respondent that unless it complied with all of the terms of Section 8 of the said

Iowa Use Tax Act, which required the collection of the said use tax on sales to residents of the State of Iowa, "*at the time of making such sales whether within or without the state,*" that said petitioners as such Board would take the necessary steps to revoke respondent's permit to do business in the State of Iowa as a foreign corporation and to cancel the licenses to transact business as a retailer at each of its twelve retail stores within the State of Iowa.

Summary of Pertinent Important Items.

The foregoing facts are not substantially disputed. Indeed, the most of them were stipulated by the parties. For the convenience of the court, some of the more important items of fact may be summarized as follows:

1. The threatened action of the Board of Assessment and Review, which was enjoined, was the cancellation of respondent's permit to do business in Iowa as a foreign corporation and the revocation of its licenses as a retail merchant in connection with its twelve retail department stores located within the state.

2. The breach of the statute on which such threatened action was predicated concerned only sales made by respondent's mail order houses located outside the state, in which instances title to the goods so sold was transferred and delivery made to the purchaser by shipment by mail or other common carrier service as designated by the purchaser, delivery to such carrier being effected outside the State of Iowa.

3. No act of respondent or of any of its agents performed within the State of Iowa had anything to do with the sales on which the use tax was not collected.

4. Such mail order sales were made in direct competition with other mail order merchants who did not maintain any place of business in the State of Iowa and who were not licensed in the State of Iowa.

5. The collection of the use tax on such mail order sales at the time of making the same without the State of Iowa would entail large loss and expense upon respondent.

6. Respondent has collected, reported and paid the use tax with respect to sales made in each of its retail department stores located in the state even though the goods so sold were shipped to the purchaser from without the State of Iowa.

7. Every single transaction involved in respondent's mail order sales from its mail order establishments in Chicago, Illinois, Minneapolis, Minnesota and Kansas City, Missouri to residents of the State of Iowa, is a transaction in interstate commerce.

SUMMARY OF THE ARGUMENT.

I.

The Collection and Payment Provisions of the Iowa Use Tax Act as Applied to the Mail Order Business of Respondent Violate the Fourteenth Amendment to the Constitution of the United States Because of Their Extra-Territorial Operation.

A. The collection and payment provisions of the Iowa Use Tax Act operate extra-territorially.

Sections 2, 8, 11 and 21, Chapter 198 of the Acts of the Iowa Forty-seventh General Assembly (Iowa Use Tax Act).

B. The mail order sales of respondent do not constitute activities within the State of Iowa, nor do such sales constitute doing business within the state. The sales are consummated outside the State of Iowa in each instance. They are separate and distinct from respondent's activities in Iowa.

Sears, Roebuck and Co. v. Roddewig, (Iowa) 292 N. W. at 135.

C. In cases coming from a state court this court does not review questions of fact but accepts the conclusions of the state tribunals as final.

Chrisman v. Miller, 197 U. S. 313; 49 L. Ed. 770.
Interstate Amusement Co. v. Albert, 239 U. S. 560; 60 L. Ed. 439.
Mackay Telegraph & Cable Co. v. Little Rock, 250 U. S. 94; 63 L. Ed. 863.
Smiley v. Kansas, 196 U. S. 447; 49 L. Ed. 546.

D. Under the law of sales, delivery of goods by a consignor to a common carrier for account of the consignee has effect as delivery to such consignee.

United States v. R. P. Andrews & Co., 207 U. S. 229; 52 L. Ed. 185.
Golo Slipper Co. v. Hamilton Shoe Stores Co., 43 F. (2d) 33.
Garretson v. Selby, 37 Iowa 529.
Iowa Uniform Sales Act, Rule 4 (2) Section 19 and Section 46 (1), Code of Iowa 1939, Sections 9948, 9975.
Nonotuck Silk Co. v. Adams Express Co., 256 Ill. 66.

E. The due process clause of the Fourteenth Amendment to the Constitution of the United States prohibits the extra-territorial operation of a state law.

Connecticut Gen. Life Ins. Co. v. Johnson, 303 U. S. 77; 82 L. Ed. 673.
St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346; 67 L. Ed. 297.
Pennoyer v. Neff, 95 U. S. 714; 24 L. Ed. 565.
Hartford Acc. & Ind. Co. v. Delta & P. Land Co., 292 U. S. 143; 78 L. Ed. 1178.
Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426; 70 L. Ed. 664.
New York Life Ins. Co. v. Dodge, 246 U. S. 357, 375; 62 L. Ed. 772.
New York Life Ins. Co. v. Head, 234 U. S. 149, 164; 58 L. Ed. 1259.
Home Ins. Co. v. Dick, 281 U. S. 397, 407; 74 L. Ed. 926.

James v. Dravo Contracting Co., 302 U. S. 134, 139; 82 L. Ed. 155.
Baldwin v. Seelig, 294 U. S. 511, 521; 79 L. Ed. 1032.
New York, Lake Erie & Western Ry. Co. v. Pennsylvania, 153 U. S. 628; 38 L. Ed. 847.

F. The due process clause of the Fourteenth Amendment prohibits a state from regulating the out-of-state activities of a foreign corporation under the guise of regulating the privilege granted such corporation to do business within the state.

New York Life Ins. Co. v. Head, 234 U. S. 149, 164; 58 L. Ed. 1259.
Connecticut Gen. Life Ins. Co. v. Johnson, 303 U. S. 77; 82 L. Ed. 673.
Terral v. Burke Construction Co., 257 U. S. 529; 66 L. Ed. 352.

G. Because of differences in point of fact, the following cases relied upon by petitioners are not controlling:

McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33; 84 L. Ed. 565.
McGoldrick v. A. H. DuGrenier, Inc., and
McGoldrick v. Felt & Tarrant Co., 309 U. S. 70; 84 L. Ed. 360.
Monamotor Oil Co. v. Johnson, 292 U. S. 86; 78 L. Ed. 1141.
Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62; 83 L. Ed. 488.
Jagel's, "A Fuel Corp." v. Taylor, 309 U. S. 619; 84 L. Ed. 983.

H. The sales at respondent's mail order establishments were consummated without the State of Iowa.

Graybar Elec. Co. v. Curry, 308 U. S. 513.
Wiloil Corp. v. Pennsylvania, 294 U. S. 169; 79 L. Ed. 838.

II.

The Collection and Payment Provisions of the Iowa Use Tax Act as Applied to the Mail Order Business of Respondent Impose a Tax upon its Gross Receipts from Activities Without the State, and Therefore Said Act as Thus Applied Violates the Fourteenth Amendment to the Constitution of the United States.

A. Regardless of the name given to the tax by the language of the statute, it is still the duty of the court to consider its real nature and effect.

Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292; 59 L. Ed. 236.
St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346; 67 L. Ed. 297.
Crew Levick Co. v. Pennsylvania, 245 U. S. 292; 65 L. Ed. 295.

B. Where an impost is levied by authority of a government upon its citizens or subjects for a governmental purpose, it is not a debt, but is a tax.

Bailies v. City of Des Moines, 127 Iowa at 126.
Liberty Mutual Ins. Co. v. Johnson Shipyards Co., 6 F. (2d) 752.

C. The due process clause of the Fourteenth Amendment denies to the State of Iowa power to tax respondent's activities outside the state.

James v. Dravo Contracting Co., 302 U. S. 134; 82 L. Ed. 155.
Connecticut General Life Ins. Co. v. Johnson, 303 U. S. 77; 82 L. Ed. 673.
Sears, Roebuck and Co. v. Roddewig (Iowa), 292 N. W. 130 at 132.

III.

The Collection and Payment Provisions of the Iowa Use Tax Act as Applied to Respondent's Mail Order Business Constitute a Regulation of and Substantial Burden Upon Interstate Commerce, and an Impairment of the Free Flow of Such Commerce, and Are, Therefore, Violative of Section 8 of Article I of the Constitution of the United States.

A. Transactions consummated by respondent at its mail order establishments in Illinois, Minnesota and Missouri with residents of Iowa, constitute interstate commerce.

Heyman v. Hays, 236 U. S. 178; 59 L. Ed. 527.
Montgomery, Ward & Co. v. Fry (Mich.) 269 N. W. 166.

B. The State of Iowa is not at liberty to regulate, or burden, or impair the free flow of interstate commerce, nor to tax the privilege of engaging in interstate commerce, by exacting a percentage of the gross receipts therefrom.

McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33; 84 L. Ed. 565.
Gwin, White & Prince v. Henneford, 305 U. S. 438; 83 L. Ed. 272.
Puget Sound Stevedoring Co. v. Tax Commissioner, 202 U. S. 90; 82 L. Ed. 68.
Fisher's Blend Station v. Tax Commission, 297 U. S. 650; 80 L. Ed. 956.
Crew Levick Co. v. Pennsylvania, 245 U. S. 292; 62 L. Ed. 295.
Adams Mfg. Co. v. Storen, 304 U. S. 307; 82 L. Ed. 1365.

ARGUMENT.

I.

The Collection and Payment Provisions of the Iowa Use Tax Act as Applied to the Mail Order Business of Respondent Violate the Fourteenth Amendment to the Constitution of the United States Because of Their Extra-Territorial Operation.

From the undisputed facts hereinbefore set forth, this court will have observed that the only transactions involved in this case are what are referred to as "mail order sales" consummated by respondent at its mail order establishments, each of which is located outside the State of Iowa. These sales are the result of the circulation of catalogs by respondent through the United States mail from one or the other of its said mail order establishments to individuals resident within the State of Iowa, and are initiated by an order made out by a resident of Iowa and forwarded by mail to respondent's mail order establishment outside the state together with remittance covering the purchase and the cost of and specifying the means of transportation. The transaction is consummated by the delivery at respondent's mail order houses located without the State of Iowa to such customer by delivery to the United States mail or other common carrier service, as designated by such customer, of the goods so ordered. Under these facts, the Iowa Supreme Court held (R. 97, 98; 292 N. W. at 135):

> "The only activities of plaintiff involved herein are the sales made pursuant to its mail order business. As to all other activities, for the purposes of this case, plaintiff concedes that the tax must be paid and it has been collected and paid. The mail order sales, however, do not constitute activities within the State of Iowa, nor do such sales constitute doing business within the State. The sales are consummated outside the State of Iowa in each instance. They are separate and

distinct from plaintiff's activities in Iowa. The statute here challenged seeks to impose upon plaintiff the obligation that it 'shall at the time of making such sales, whether within or without the state, collect the tax imposed by this chapter from the purchaser.' The sales are made outside of Iowa and the statute requires plaintiff to collect the tax at the time the sales are made. It clearly seeks to regulate activities of plaintiff outside the state. Under the provisions of Section 6943.122, defendants seek to cancel plaintiff's license as a retailer in this state and its permit to do business here as a foreign corporation for failure to pay a debt which constitutes a regulation of its activities outside of Iowa."

The foregoing finding of the Supreme Court of Iowa that—

> "The mail order sales, however, do not constitute activities within the State of Iowa, nor do such sales constitute doing business within the state. The sales are consummated outside the State of Iowa in each instance. They are separate and distinct from plaintiff's activities in Iowa."—

is binding upon this court for, as said by this court in *Chrisman v. Miller*, 197 U. S. 313, 49 L. Ed. 770,

> "In cases coming from a state court we do not review questions of fact, but accept the conclusions of the state tribunals as final."

In *Interstate Amusement Co. v. Albert*, 239 U. S. 560, 60 L. Ed. 439, this court refused to disturb the finding of the Supreme Court of Tennessee that business was being done within that state, and said:

> "It is settled that such findings of fact, in ordinary cases other than those arising under the 'contract clause' of the Constitution, are binding upon this court.
> * * *
>
> There being adequate support in the record for the finding of the supreme court of the state that plaintiff in error was doing business in the state, other than in-

terstate commerce, without complying with the statute quoted, the contentions based upon the commerce clause and the due process clause alike must fall."

In *Mackay Telegraph & Cable Co. v. Little Rock*, 250 U. S. 94, 63 L. Ed. 863, this court said:

> "Plaintiff in error contends that the court erred in construing the ordinance as imposing the tax with respect to the poles standing upon the railroad right of way, and especially as to the 35 poles which, at the time of acceptance of the ordinance, were without the limits of the city. But as no question is raised here under the contract clause of the Constitution, we are not at liberty to revise the decision of the state court upon the question of construction, and can only determine whether, as construed and applied, the ordinance deprives plaintiff in error of rights secured by other provisions of the Constitution and laws of the United States."

And the State Supreme Court's construction of its own statutes and its findings of fact in connection therewith are accepted by this court even though the state court applies a rule of construction not theretofore recognized here. *Smiley v. Kansas*, 196 U. S. 447, 49 L. Ed. 546.

That the foregoing findings of fact by the Supreme Court of Iowa had ample and adequate support in the evidence, is apparent from the statement of facts heretofore made and, furthermore, such findings are in complete accord with principles of the general law of sales as well as decisions of this court and of prior decisions of the Supreme Court of Iowa. The court will recall that in each instance involved in this case the transaction is initiated by an order made out by a resident of Iowa and forwarded by United States mail to respondent's mail order establishment outside the state together with remittance covering the purchase and the cost of and specifying the means of transportation. Surely it is apparent that in such initiation

of the transaction respondent performed no activity of any kind. Such order being accepted by respondent at its mail order establishment outside the state, the transaction is consummated outside the state by delivery, to the United States mail or other common carrier service as designated by such customer, of the goods so ordered. Such delivery to a designated carrier becomes, in legal effect, a delivery outside the state to such customer for, as said by this court in *United States v. R. P. Andrews & Co.*, 207 U. S. 229, 52 L. Ed. 185:

> "That, as a general rule, the delivery of goods by a consignor to a common carrier, for account of the consignee, has effect as delivery to such consignee, is elementary. That where a purchaser of goods directs their delivery for his account to a designated carrier, the latter becomes the agent of the purchaser, and delivery to such carrier is a legal delivery to the purchaser, is also beyond question."

In *Golo Slipper Co. v. Hamilton Shoe Stores Co.*, 43 F. (2d) 33, the Circuit Court of Appeals of the Tenth Circuit said:

> "It is settled law that, in the absence of a different agreement, delivery to a carrier at the location of the seller constitutes delivery to the purchaser, and title vests in the latter at that time. *Delaware, L. & W. R. Co. v. U. S.*, 231 U. S. 363, 58 L. Ed. 269."

And the Supreme Court of Iowa in the early case of *Garfetson v. Selby*, 37 Iowa 529, announced the same rule in the following language:

> "The rule of law applicable to cases of this character is well stated in *Whiting v. Farrand*, 1 Conn. 60 as follows: 'When a contract is made for the sale of goods which are not delivered, but are to be sent to the purchaser, if the vendor send them in the mode agreed on or directed by the purchaser * * * then the goods during the voyage are at the risk of the purchaser."

And these conclusions are in strict accordance with the provisions of the Uniform Sales Act adopted in Iowa in 1919 as disclosed by Rule 4 (2) of Section 19 and Section 46 (1) of said Act. See also—

Nonotuck Silk Co. v. Adams Express Co., 256 Illinois 66.

Upon such facts and considerations the Iowa Supreme Court concluded:

> "Under the provisions of Section 6943.122, defendants seek to cancel plaintiff's license as a retailer in this state and its permit to do business here as a foreign corporation for failure to pay a debt which constitutes a regulation of its activities outside of Iowa. Under repeated pronouncements of the Supreme Court of the United States, hereinbefore reviewed and quoted from, the State of Iowa has no such right." (R. 144)

This conclusion, we submit, is entirely in accord with the controlling applicable decisions of this court.

In *Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77, 82 L. Ed. 673, this court, in an opinion rendered January 31, 1938 and written by Mr. Justice Stone, had under consideration the validity of a tax laid by the State of California on the receipt by appellant in Connecticut of insurance premiums during the years 1930 and 1931 upon reinsurance contracts. The contracts were entered into with insurance companies which were doing business in the State of California and which companies had effected life insurance contracts on residents of California. In holding that such tax was invalid as a violation of the limitations prescribed by the Fourteenth Amendment to the Federal Constitution, the court said:

> "As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the

power to lay it. Hence, it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. * * *"

In *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346, 67 L. Ed. 297, the court, speaking through Justice Holmes, said:

> "It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside."

These decisions of this court are merely a restatement of the long-settled rule that the sovereign powers of a state are limited to its territorial boundaries.

In *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, this court said:

> "The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. L., ch. 2; Wheat. Int. L., pt. 2, ch. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions."

Nor may the power of the state to regulate activities performed without the state be enlarged because one of the parties to such activities is a citizen of such state.

Hartford Accident & Ind. Co. v. Delta & P. Land Co., 292 U. S. 143, 149; 78 L. Ed. 1178.

Nor is the power of the state to so regulate such activities performed outside the state enlarged merely because such activities involve contracts relating to property within the state.

Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426; 70 L. Ed. 664.

See also:

New York Life Ins. Co. v. Dodge, 246 U. S. 357, 375; 62 L. Ed. 772.
New York Life Ins. Co. v. Head, 234 U. S. 149, 164; 58 L. Ed. 1259.
Home Ins. Co. v. Dick, 281 U. S. 397, 407; 74 L. Ed. 926.
James v. Dravo Contracting Co., 302 U. S. 134, 139; 82 L. Ed. 155.
Baldwin v. Seelig, 294 U. S. 511, 521; 79 L. Ed. 1032.
New York, Lake Erie & Western Ry. Co. v. Pennsylvania, 153 U. S. 628; 38 L. Ed. 847.

And the constitutional limitation upon the power of the state to regulate activities outside its borders may not be avoided under the guise of a license or otherwise.

In *New York Life Ins. Co. v. Head*, 234 U. S. 149, 164; 58 L. Ed. 1259, the court, speaking by Mr. Chief Justice White, said:

> "It is true it has been held that, in view of the power of a state over insurance, it might, as a condition of a license given to a foreign insurance company to do business within its borders, impose a condition as to business within the state, which otherwise, but for the complete power to exclude, would be held repugnant to the Constitution. In other words, that a company having otherwise no right whatever, for any purpose, to go in without a license, would not be heard, after accepting the same, to complain of exactions upon which the license was conditioned as unconstitutional, because of its voluntary submission to the same. But even if it be put out of view that this doctrine has been either expressly or by necessary implication overruled, or at all events, so restricted as to deprive it of all ap-

plication to this case (see *Harrison v. St. Louis & S. F. R. Co.*, 232 U. S. 318, 332, 34 S. Ct. 333, 58 L. Ed. [621, 626] [L. R. A. 1915F, 1187], and authorities there cited), it here can have no possible application since such doctrine, at best, but recognized the power of a state, under the circumstances stated, to impose conditions upon the right to do the business embraced by the license, and therefore gives no support to the contention here presented, which is that a state, by a license, may acquire the right to exert an authority beyond its borders which it cannot exercise consistently with the Constitution. *But the Constitution and its limitations are the safeguards of all the states, preventing any and all of them, under the guise of license or otherwise from exercising powers not possessed.*" (Italics ours)

In *Connecticut General Life Ins. Co. v. Johnson, supra,* this court said:

"No contention is made that appellant has consented to the tax imposed as a condition of the granted privilege to do business within the state. Nor could it be, for it appears that appellant had conducted its business in California under state license for many years before the taxable years in question and before the taxing act was construed by the highest court of the state, in *Connecticut Gen. L. Ins. Co. v. Johnson, supra,* to apply to premiums received in Connecticut from reinsurance contracts effected there. A corporation which is allowed to come into a state and there carry on its business may claim, as an individual may claim, the protection of the Fourteenth Amendment against a subsequent application to it of state law. *Hanover F. Ins. Co. v. Harding (Hanover F. Ins. Co. v. Carr)* 272 U. S. 494; 71 L. Ed. 372, 47 S. Ct. 179, 49 A. L. R. 713; compare *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, 262 U. S. 544, 67 L. Ed. 1112, 43 S. Ct. 636."

See also in *Terral v. Burke Construction Co.*, 257 U. S. 529, 66 L. Ed. 352, the court said:

"The principle established by the more recent decisions of this court is that a state may not, in imposing conditions upon the privilege of a foreign corporation's

> doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not."

Nor is the power of the state to regulate activities so performed without its borders by a foreign corporation qualified to do business in the state enlarged because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within.

In *Connecticut General Life Ins. Co. v. Johnson, supra,* it is said:

> "It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

Under the undisputed facts, and under the findings of fact by the Supreme Court of Iowa, then, we submit the decision of that court, that the collection and payment provisions of the Iowa Use Tax Act as construed and administered by the petitioners and as applied to the mail order sales of respondent constitutes the regulation of activities of respondent outside the State of Iowa and is therefore void, is in accordance with the foregoing controlling and applicable decisions of this court and, therefore, should be affirmed.

Nor is this conclusion contrary to certain cases relied upon by petitioners in their brief and in the court below and which we shall presently consider, for the reason that in each of such cases there was in fact a "local activity"

or "jurisdictional incident" performed within the confines of the taxing authority.

One of such cases so relied upon by petitioners is *McGoldrick v. Berwind-White Coal Min. Co.*, 309 U. S. 33, 84 L. Ed. 565, where the respondent, who was the seller, had agreed to make deliveries to customers in New York City as part of its contracts of sale. It appeared "all the sales contracts with the New York customers in question were entered into in New York City, and with two exceptions, presently to be considered separately, called for delivery of the coal by respondent by barge, alongside the purchasers' plants or steamships * * *. All the deliveries, with the exceptions already noted, were made within New York City." (at page 44) Justice Stone, speaking for the majority of this court pointed out (at page 50) that this court has uniformly sustained a tax imposed by the state of the buyer upon a sale of goods "*effected by delivery* to the purchaser upon arrival at destination after an interstate journey,", and, specifically with reference to the New York City sales tax, said (at page 58):

> "*Here the tax is conditioned upon a local activity, delivery of goods within the state* upon their purchase for consumption. It is an activity which apart from its effect on the commerce, is subject to the state taxing power." (Italics ours)

In the dissenting opinion written by Mr. Chief Justice Hughes the "local activity" or "jurisdictional incident" which justified the imposition of the New York sales tax was expressly recognized as the physical delivery by the seller of the coal in New York City, for it is there said:

> "It is urged that there is a taxable event within the state. That event is said to be the delivery of the coal. * * *
>
> It is said that title to the coal passes to the purchaser on delivery."

But in this case, as we have pointed out, there was no local activity and therefore no jurisdictional incident performed by respondent in connection with any of the transactions within the State of Iowa: and so the Supreme Court of that state has expressly found the facts.

Even in *McGoldrick v. Berwind-White Coal Mining Co., supra,* the court expressly noted two classes of sales which were not governed by its decision. In the two classes noted as exceptions by this court, delivery was made by the seller to a carrier for the buyer outside of New York City "in one case f.o.b. at the mines in Pennsylvania, and in the other at the pier in Jersey City, New Jersey, and deliveries were made accordingly." With respect to these transactions, this court said (at pages 58 and 59):

> "Respondent asked the state courts to rule that the taxing act did not apply to these transactions, particularly because the enabling statute expressly prohibits the city from imposing a tax upon 'any transaction originating and/or consummated outside the territorial limits of the City. * * * This question the state courts left unanswered, the Court of Appeals resting its decision wholly on the constitutional ground.
>
> "Upon the remand of this cause for further proceedings not inconsistent with this decision, the state court will be free to decide the state question, and the remand will be without prejudice to the further presentation in this Court of any federal question remaining undecided here, if the state court shall determine that the taxing statute is applicable."

In the companion cases of *McGoldrick v. A. H. DuGrenier, Inc.* and *McGoldrick v. Felt & Tarrant Co.*, decided together and reported at 309 U. S. 70, 84 L. Ed. 360, also relied upon by petitioners, this court indicated the "jurisdictional event" to be the transfer of possession to the purchaser within New York City pursuant to orders taken within that city, saying (at page 77):

"In both cases the tax was imposed on all the sales of merchandise for which orders were taken within the city and *possession of which was transferred to the purchaser there.* Decisions in both is controlled by our decision in the *Berwind-White Coal Min. Co.* case. For reasons stated at length in the opinion in that case the tax so laid does not infringe the commerce clause." (Italics ours)

Thus, the "jurisdictional event" was specifically stated to be the transfer of possession, or delivery, within the city. This conclusion is confirmed by the reference to the *Berwind-White* case where the "jurisdictional event" was physical delivery by the seller in New York City.

In the *Felt & Tarrant* case it appeared that the respondent maintained an office in New York City from which its agents sold in the city orders for comptometers which were forwarded to the Illinois office for approval. Upon acceptance of such order each machine was invoiced to the purchaser "and shipped to the New York City office of respondent's sales agent, where it is inspected, tested and adjusted, *and then delivered to the purchaser.*"

Thus, as in the *Berwind-White Coal Min. Co.* case, the "local activity" or "jurisdictional incident" consisted of physical delivery by the respondent to the purchaser within New York City.

In the *DuGrenier, Inc.* case it appeared that machines manufactured by respondent in Massachusetts were "sold throughout the United States by an exclusive sales agent, the respondents' Stewart & McGuire, Inc., having an office in New York City. The sales in the city, *"when not of machines located at the New York office"* were effected through solicitation of orders by the agent which were forwarded to the Massachusetts office and if accepted were filled by shipping the purchased machine by rail or truck direct to the purchaser in New York City who paid the freight.

Thus it appears that there was a physical delivery of the

machines, when such were located at the New York office, to the purchaser in New York City, and it was only when machines were not on hand at the New York office that orders were filled by shipments from without the state. Such shipments, then, were purely incidental to the transaction and were made for purposes of convenience on the part of the seller. In such a case it is quite obvious that the purchaser, ordering goods from the seller or his agent located within the same state, has no particular concern whether his order be filled from stock within or without the state. The sales, then, were New York City sales and as such subject to the taxing jurisdiction of New York City.

This court considered the nature of similar transactions in *Graybar Electric Co. v. Curry*, 308 U. S. 513, which case affirmed the judgment of the State Supreme Court (238 Ala. 116, 189 So. 186), where it was said:

> "The sales were Alabama sales. The means by which, and the place from which, the complainant obtained the goods to fulfill its contract were but incidents in the transaction, and cannot serve to change the status of the transactions. The consumers had no dealings with the non-resident manufacturers. Their contracts were with the complainant in Alabama for the sale and delivery of the goods to them in Alabama."

In *Wiloil Corp. v. Pennsylvania*, 294 U. S. 169, 79 L. Ed. 838, this court considered facts similar to those appearing in the *DuGrenier, Inc.* case. There it appeared (at page 172) that:

> "Appellant, a Pennsylvania corporation having its principal place of business in Pittsburgh, sells liquid fuels at wholesale and is a distributor as defined by the act. The tax in controversy was laid at three cents per gallon upon the contents of 13 tank cars sold and delivered by it. All were ordered through its agent in Philadelphia for delivery to purchasers at that city or at Essington, Pennsylvania. The orders specified a price per gallon 'f.o.b. Wilmington, Del., plus 3c tax,'

> and were subject to, and received, appellant's approval at its office in Pittsburgh."

It further appeared that there was no selection of goods by purchasers and that appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania. Upon these facts the court said: (at page 175)

> "Admittedly the sales contracts were made in Pennsylvania. Deliveries to purchasers at destination were made in accordance with the terms of the sales. If interstate transportation was not required or contemplated, it may be deemed as merely incidental."

So, in the *DuGrenier* case, the interstate shipment on some occasions of the goods to purchasers in New York City was merely incidental, but in the instant case respondent not only did not but could not fill the orders from sources within the State of Iowa. It had no facilities for doing so. Each of the transactions between it and its purchasers contemplated the shipment of such goods from without the state. Thus, we submit, because of the difference in point of fact, the *DuGrenier, Inc.* case constitutes no authority for the position of petitioners.

In *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, 78 L. Ed. 1141, also relied upon by petitioners, this court sustained an act of Iowa requiring distributors of gasoline to collect a tax on gasoline distributed to users in the State of Iowa. An examination of that decision will disclose that this court neither considered nor decided the validity of the act there involved because of its extra-territorial application, for the very simple reason that there was no extra-territorial activity involved. The Monamotor Oil Company, an Arizona corporation, had its bulk stations and refinery in Iowa. It was a distributor within the meaning of the Iowa Motor

Fuel Tax Act, and had procured a license from the treasurer of state as such distributor. It was actively engaged in the distribution of gasoline in the State of Iowa. That was its activity. On some occasions sales were completed by shipment from Oklahoma direct to purchasers in Iowa but the Monamotor Company, as in *Wiloil Corp. v. Pennsylvania, supra,* was free to effect performance of such contracts of sales by shipments from its bulk stations and refinery located in Iowa, and, if interstate transportation was not required or contemplated, it was merely incidental. Furthermore, this court in that case expressly reserved the decision of the question whether in other circumstances then disclosed by the record in that case, the revocation of the license might constitute a denial of due process in violation of the Fourteenth Amendment, and, in this connection, said:

> "The revocation of the appellant's license by the state treasurer without notice and hearing did not deprive it of property without due process in violation of the Fourteenth Amendment. Whether in other circumstances the license contemplated by the statutes under consideration might be considered property within the protection of the due process clause we need not determine. It is sufficient in this case to advert to the undisputed facts disclosed by the record. The law imposes no penalty for conducting the business of a distributor without a license; the only penalties mentioned are for failure to report gasoline intended for use in the state, and to pay the tax. The state officers have not sought to prevent the appellant from continuing its business as a distributor, and have in this proceeding, both by answer and by evidence, avowed their purpose to take no further action against the appellant, either criminal or civil, until the conclusion of the civil suit now pending in a state court to recover the tax, the failure to pay which was the ground of revocation of the appellant's license. The state's officials are prosecuting the action as a test suit. There is therefore no threat of immediate harm as a result of the re-

vocation of the license, and the action of the state treasurer in revoking it cannot affect the pending civil suit or any other action civil or criminal which may hereafter be brought."

How different are the facts here. This court knows the very drastic penalties prescribed by Iowa law on account of the conduct of business within its boundaries by a foreign corporation without first procuring a permit so to do, and this court knows also that under the Iowa Retail Sales Tax Act every retail merchant is prohibited from engaging in business until he has first procured a permit from the Iowa Board of Assessment and Review so to do. The very action enjoined here is the revocation of the right of respondent to engage in its business as a retail merchant in the State of Iowa, whereas in the *Monamotor Oil Company v. Johnson* case, it is expressly stated that:

> "The state officers have not sought to prevent the appellant from continuing its business as a distributor, and have in this proceeding, both by answer and by evidence, avowed their purpose to take no further action against the appellant, either criminal or civil, until the conclusion of the civil suit now pending in the state court to recover the tax, the failure to pay which was the ground of revocation of the appellant's license."

In *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62, 83 L. Ed. 488, also relied upon by petitioners, there was involved the collection of a use tax on property sold by the appellant through its general agents who were doing business in California, and this court, in stating the facts, quoted from the decision of the lower court, 23 Fed. Supp. 186 as follows:

> "That each of these two general agents maintains an office in this state, the lease to such office designating the plaintiff as lessee therein, the rent for the same being paid by plaintiff, while all other expenses of maintaining such office are paid by the general agent. As

soon as an order is accepted a particular machine is appropriated for that purpose in plaintiff's shipping department in Illinois. All machines sold for delivery in California are shipped from one of plaintiff's distributing points outside of the state. Sometimes machines are forwarded directly to the purchasers, while in other instances, in order to secure reduced freight charges, large groups of machines are shipped to the general agent who makes delivery to the respective purchasers."

Indeed, the seller's contract in that case expressly provided that deliveries must be made by the seller. Plainly then, the "local activity" or "jurisdictional incident" justifying the enforcement of that act was amply disclosed as a matter of fact by the record.

Petitioners also rely upon *Jagels, "A Fuel Corporation," v. Taylor*, 309 U. S. 619, 84 L. Ed. 983. Originally in this case the Appellate Division of the Supreme Court of New York affirmed without opinion the determination of the Comptroller of New York, and the facts are stated in a dissenting opinion by Judge Martin, 255 App. Div. 965, 8 N. Y. S. (2d) 456. The judgment was affirmed without opinion by the New York Court of Appeals, 280 N. Y. 766, 21 N. E. (2d) 526, and this court also affirmed without opinion. In summarizing the facts, the court said:

> "Its principal business calls for *delivery of coal in the centrally located section of New York City*, but, should a customer want delivery outside of this territory, the petitioner has delivery made on its account from yards of associated dealers located within the city." (Italics ours)

Thus, it is apparent that the seller was able to supply coal from stocks of associated dealers within the city, and an interstate shipment from New Jersey was not essential for filling an order.

In addition, it appears that the contract of sale required delivery in New York City to be made by the seller. Peti-

tioners contend that the third type of sales in this case supports their view, but the Court of Appeals plainly describes this type as:

> "A written order was sent by the purchaser in New York to the New Jersey office, *and delivery was made from the New Jersey yard to the consumer in New York.*" (Italics ours)

Likewise, in the further statement of facts in the dissenting opinion of Judge Martin, the jurisdictional event is indicated as delivery in New York, as follows:

> "Here the offer is made in New York, accepted in New Jersey, and *calls for performance by delivery in New York*, of a product which, by reason of its nature, originates in Pennsylvania and does not come within the State of New York until *delivery is made by the petitioner* from its New Jersey yard." (Italics ours)

Thus it appears that a local activity by the seller, such as delivery of the physical property to the purchaser within the confines of the taxing state, is a necessary prerequisite as a matter of fact to the justification of the exercise of either the taxing or regulatory powers of the state of the purchaser's residence, and, as we have pointed out, under the undisputed facts hereinbefore set forth, there was neither physical delivery of the goods by respondent as the seller nor any other local activity by it performed within the State of Iowa with respect to the transactions involved. The receipt of the orders with the purchase price and transportation charges including the designation of method of shipment by the purchaser at the mail order establishment of respondent without the state, the acceptance thereof there, the filling of such orders there, and the direct shipment of the goods covered by such orders to such customer from such mail order houses without the state, establishes that the respondent performed no local activity with respect to such transactions within the State of Iowa. De-

livery through the United States mail or other common carrier of such direct shipments constituted delivery to such purchasers at the places of business of the mail order houses of respondent, all of which were without the state.

So, because of the differences in point of fact, the foregoing cases do not constitute controlling authority justifying the reversal of the decision of the Supreme Court of Iowa; for the cases just referred to indicate the farthest point to which this court has gone in sustaining state jurisdiction over a non-resident seller for taxation or regulation in connection with interstate sales, is where the seller makes delivery to the buyer or performs some other activity in connection with the particular transaction in the state asserting jurisdiction to so tax or regulate.

For all of the foregoing reasons, we submit that the application of said Iowa Use Tax Act to the mail order business of respondent conducted at its mail order establishments in Illinois, Minnesota, and Missouri, infringes the due process clause of the Fourteenth Amendment to the Federal Constitution, which prohibits the extra-territorial operation of a state law, and that, therefore, the decision of the Supreme Court of Iowa was correct and should be affirmed.

II.

The Collection and Payment Provisions of the Iowa Use Tax Act as Applied to the Mail Order Business of Respondent Impose a Tax upon its Gross Receipts from Activities Without the State, and Therefore Said Act as Thus Applied Violates the Fourteenth Amendment to the Constitution of the United States.

The requirement of the Iowa Use Tax Act (Sec. 6943.109, Code of Iowa, 1939) that respondent collect the tax at the time of making its mail order sales outside the State of Iowa, and the provision that such taxes so required to be col-

lected shall constitute a debt owing by the respondent to the State of Iowa (Sec. 6943.112, Iowa Code of 1939), in legal effect imposes a tax upon the activities of respondent outside the state, and thereby violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

While in Section 2 of the Iowa Use Tax Act the tax is described as one levied upon the use in the State of Iowa of tangible personal property, it is a matter of no consequence what name may be given to the tax by the language of the statute. It is still the duty of the court to consider its real nature and effect.

Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. Ed. 236.
St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346, 67 L. Ed. 297.
Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 65 L. Ed. 295.

And, bearing this rule in mind, as well as the fact that under the express terms of Section 8 of said Act, the tax is really exacted at the time of making said mail order sales without the state, and is measured by the gross purchase price for the commodities so sold; and bearing in mind also the fact that respondent cannot collect from its mail order purchasers all of said tax, it is, nevertheless, subjected to a liability for the full amount thereof. We earnestly contend then that the tax thus provided, as applied to respondent's mail order business conducted in its mail order establishments without the state, is not a use tax at all, but is a sales or gross receipts tax, operating upon sales so made by respondent outside the State of Iowa. Therefore, it is a tax upon extra-territorial activities of respondent.

True, in Section 11 of said Act, the amount of such tax is described as constituting a "debt" owed by the retailer to the State of Iowa, but the use of such language does not

change the nature of the exaction. A debt is an obligation founded on contract or agreement, either express or implied. Where an impost is levied by authority of a government upon its citizens or subjects for a governmental purpose, it is not a debt, but is a tax. An examination of the Iowa Use Tax Act will show that the tax therein provided is for general governmental purposes.

In *Bailies v. City of Des Moines*, 127 Iowa 124 at 126, the court, in considering this question said:

> "The general tenor of the authorities is to the effect that a tax in its essential characteristics is not a debt, but an impost levied by authority of government upon its citizens or subjects for the support of the state. It is not founded on contract or agreement, but operates *in invitum*. Whereas a debt is a sum of money due by certain and express agreement, and originates in or is founded upon contracts express or implied. In *Meriwether v. Garrett*, 102 U. S. 472, (26 L. ed. 197), it is said: 'A tax is a charge imposed by the Legislature for the purpose of revenue. It is not founded upon contract, and does not establish the relation of debtor and creditor. It is an enforced proportional contribution levied by authority of the State.' See, also, the long collection of cases in volume 2, Words and Phrases, page 1883."

In *Liberty Mutual Ins. Co. v. Johnson Shipyards Co.*, 6 F. (2d) 752, it was held:

> "A 'debt' is a sum of money due on contract, express or implied, or one which is evidenced by a judgment; and 'taxes' are not debts but imposts levied by government for its support or for some special purpose which the government has recognized, and are due to the government in its sovereign capacity, while debts are due to the government in its corporate capacity."

And where such tax is upon activities which were carried on without the territorial limits of the state, it has no jurisdiction to impose the same.

In *James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 155, the court had under consideration the validity of a statute of West Virginia imposing an annual privilege tax upon the business of contracting. The Contracting Company in that case had four contracts with the United States Government for the construction of locks and dams in the Kanawha River and locks in the Ohio River, a part of activities in connection with which were performed in the State of West Virginia but other parts of activities in connection with which were performed outside the State of West Virginia, and, in deciding the question whether the state had the territorial jurisdiction to impose the tax measured by the gross receipts of the Contracting Company under such contracts, this court, speaking by Mr. Chief Justice Hughes, said:

> "As to Territorial Jurisdiction.—Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia, the state had no jurisdiction to impose the tax. * * *
>
> A large part of respondent's work was performed at its plant at Pittsburgh. The stipulation of facts shows that respondent purchased outside the State of West Virginia materials used in the manufacture of the roller gates, lock gates, cranes, substructure racks and spur rims, structural steel, patterns, hoisting mechanism and equipment, under each of its contracts, and fabricated the same at its Pittsburgh plant. The roller gates and appurtenant equipment were preassembled at respondent's shops at Pittsburgh and there were inspected and tested by officers of the United States Government. The materials and equipment fabricated at Pittsburgh were there stored until time for delivery, and the appropriate units as prepared for shipment were then transported by respondent to the designated sites in West Virginia and there installed.
>
> * * *
>
> It is clear that West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work done in Pennsylvania."

The due process clause of the Fourteenth Amendment to the Federal Constitution denies the State of Iowa the power to impose a tax upon respondent's gross receipts realized from the conduct of its mail order business at its establishments outside the State of Iowa. This court in *Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77, 82 L. Ed. 673, speaking to this question, said:

> "But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. * * * It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

The Supreme Court of Iowa in its opinion, in speaking to this question, said:

> "Defendants contend that the tax is a tax upon the use of property in this state, is really a tax upon the purchaser and is not a tax upon the plaintiff at all. Perhaps from a subtle and technical standpoint this may be true, but, if true, it is unimportant. Section 6943.109 requires that the tax be collected when the sale is made. Under the facts herein, the property is then without the state. Section 6943.112 makes the amount of the tax a debt owed by plaintiff and Section

6943.122 provides that a failure to pay that debt shall constitute proper grounds for revoking plaintiff's permit to do business in this state. From any reasonable or practical standpoint, the amount of the tax being made a debt of plaintiff, the statute at least constitutes regulation of plaintiff's activities outside the state as a condition to it being granted a license to do business in the state. This cannot be done." (Record, 136; 292 N. W. 132)

We submit that this conclusion of the Supreme Court of Iowa is in accord with the foregoing applicable and controlling decisions of this court, and its decision that the State of Iowa was without power to impose or levy this tax on account of respondent's mail order sales consummated entirely outside the borders of Iowa, should be affirmed.

III.

The Collection and Payment Provisions of the Iowa Use Tax Act as Applied to Respondent's Mail Order Business Constitute a Regulation of and Substantial Burden Upon Interstate Commerce, and an Impairment of the Free Flow of Such Commerce, and Are, Therefore, Violative of Section 8 of Article I of the Constitution of the United States.

Every single transaction resulting in a purchase from and sale at respondent's mail order houses located in the states of Illinois, Minnesota and Missouri to residents of the State of Iowa, is a transaction in interstate commerce. As we have pointed out, the inception of such transaction is the sending of an order by United States mail from Iowa to such other state, the remittance of the purchase price by United States mail from Iowa to such other state, the acceptance of such order in such other state, and the shipment of the tangible personal property either by United States mail or other public carrier across the state line in-

to Iowa. Although the right of respondent to engage in such interstate business does not exist because of any authority from the state of Iowa, nevertheless, by Section 8 of said act, it is required *"at the time of making such sales"* to collect the tax imposed by the act.

The interstate character of the mail order business has been specifically recognized by this court.

Heyman v. Hays, 236 U. S. 178, 59 L. Ed. 527.

See also:

Montgomery, Ward & Co. v. Fry (Mich.) 269 N. W. 166.

As we have heretofore pointed out, the record abundantly shows that even if it tried to collect such tax from its customers it could not do so in full. These mail order sales are not face-to-face transactions. They are transactions conducted at a distance. Obviously, it would be much more difficult to effect the collection of the tax on such distant transactions than is true in connection with the collection of the Iowa retail sales tax which involves face-to-face transactions.

Respondent received a large number of mail orders every day at its said mail order establishments and puts them through its plant on a time schedule and there is no allowance or arrangement for withholding orders from such schedule. It would substantially increase the cost of operating respondent's business to hold orders which did not include an amount representing such use tax in suspense, and would require a major rearrangement of the character of the business (R. 57).

We have heretofore shown the substantial character of the burden cast upon respondent by the collection and payment provisions of the Iowa Use Tax Act. Such burden is shown by the record without dispute to amount to many thousands of dollars per year, and such burden results,

insofar as the sales consummated from the mail order establishments of respondent in Illinois, Minnesota and Missouri to residents of Iowa are concerned, in the imposition of a gross receipts or gross percentage tax operating upon transactions in interstate commerce. Such being the case, the State of Iowa is not at liberty to tax the privilege of engaging in interstate commerce by exacting in return therefor a percentage of the gross receipts.

While sustaining the principle that delivery by the seller within a state immediately following interstate transportation, is an event or incident investing such state with jurisdiction for tax and regulatory purposes, this court, in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 84 L. Ed. 565 reiterated but distinguished the proposition that a state tax upon receipts derived from interstate commerce is an infringement of the commerce clause, stating:

> "It is true that a state tax upon the operations of interstate commerce measured either by its volume or the gross receipts derived from it has been held to infringe the commerce clause, because the tax if sustained would exact tribute for the commerce carried on beyond the boundaries of the taxing state, and would leave each state through which the commerce passes free to subject it to a like burden not borne by interstate commerce. See *Western Live Stock v. Bureau of Revenue, supra* (303 U. S. 255, 82 L. ed. 827, 58 S. Ct. 546, 115 ALR 944); *Gwin, White & Prince v. Henneford, supra* (305 U. S. 434, 83 L. ed. 276, 59 S. Ct. 325)."

In the case of *Gwin, White & Prince v. Henneford*, 305 U. S. 438, 83 L. Ed. 272, 276, the opinion states:

> "But it is enough for present purposes that under the commerce clause, in the absence of congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which

extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to the activities carried on within the state * * * burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject."

But it is firmly established by controlling decisions of this court that under facts such as here disclosed the State of Iowa is without power to impose such a burden or to impair or regulate the free flow of such interstate commerce.

In *Puget Sound Stevedoring Co. v. Tax Commissioner*, 302 U. S. 90, 82 L. Ed. 68, the court had under consideration a statute of the State of Washington which imposed a tax for the privilege of engaging in business activities within the state at the rate of ½ of 1% of the gross income from such business. The Puget Sound Stevedoring Company entered into a contract for the loading and discharging of vessels which were engaged in interstate and foreign commerce, and the court held that the performance of such work by a stevedore was as indispensable an agency of commerce as a ship-owner or master, and therefore that such work constituted interstate commerce. In holding that the Washington statute contravened the provisions of Section 8 of Article I of the Constitution of the United States, the court, speaking by Mr. Justice Cardozo, said:

"The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling. *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 341, 342, 30 L. ed. 1200, 1203, 1204, 7 S. Ct. 1118, 1 Inters. Com. Rep. 308; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 8 S. Ct. 1380, 2 Inters. Com. Rep. 134; *Galveston H. & S. A. R. Co. v. Texas*,

210 U. S. 217, 52 L. ed. 1031, 28 S. Ct. 638; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 62 L. ed. 295, 38 S. Ct. 126; *Matson Nav. Co. v. State Bd. of Equalization*, 297 U. S. 441, 444, 80 L. ed. 791, 794, 56 S. Ct. 553; *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650, 655, 80 L. ed. 956, 959, 56 S. Ct. 608."

In *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650, 80 L. Ed. 956, the court had under consideration a statute of the State of Washington which imposed an occupation tax measured by gross receipts from a radio broadcasting station, the broadcasting waves of which were projected across state lines, and in an opinion by Mr. Justice Stone the court held:

> "As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce. *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 7 S. Ct. 1118, 1 Inters. Com. Rep. 308; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 8 S. Ct. 1380, 2 Inters. Com. Rep. 134; *Galveston H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 52 L. ed. 1031, 28 S. Ct. 638; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 62 L. ed. 295, 38 S. Ct. 126."

In *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, there was involved a state tax upon the business of selling goods in foreign commerce measured by gross receipts for goods so sold and shipped, and such tax was pronounced an impost upon exports and therefore without the power of the state to lay because of the provisions of Section 8 of Article I of the Constitution of the United States investing the Congress with exclusive power to regulate foreign commerce. In the course of the opinion the court said:

> "Nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise. It operates to lay a direct burden upon every transaction in commerce by withholding for the

use of the State a part of every dollar received in such transactions."

In *Adams Mfg. Co. v. Storen*, 304 U. S. 307, 82 L. Ed. 1365, there was involved a statute of Indiana laying a gross receipts tax upon all sales of a manufacturing company located in that state. In an opinion by Mr. Justice Roberts, the court held that such tax constituted an unlawful burden upon interstate commerce and violated Article I, Section 8 of the Federal Constitution, and said:

"We conclude that the tax is what it purports to be,—a tax upon gross receipts from commerce. Appellant's sales to customers in other states and abroad are interstate and foreign commerce. The Act, as construed, imposes a tax of one percent on every dollar received from these sales.

The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Section 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction but it is settled that this will not save the tax if it directly burdens interstate commerce."

As we have heretofore pointed out, respondent in the conduct of its mail order business in its establishments in Chicago, Minneapolis and Kansas City, is in direct competition with other mail order establishments, neither of which maintains a place of business within the State of Iowa but each of which procures its orders by mail from customers

in Iowa and makes deliveries to its purchasers mainly through parcel post or freight.

It is manifest that the State of Iowa is impotent to impose the obligation to collect the use tax upon such concerns as Spiegel's, Incorporated, the Chicago Mail Order House, National Bellas Hess and Jim Brown Fencing Company, neither of which has any retail establishments in the State of Iowa. It simply cannot reach them. There is no means by which it can assert any authority over them. Their engagement in their business in interstate commerce is a right which they enjoy apart from the control of the State of Iowa. It is true that by Section 9 of the Iowa Use Tax Act such concerns having no place of business within the State of Iowa are naively invited to register as a collecting agent for the State of Iowa, but the record shows that they have not done so, and yet, merely because respondent has qualified to do business in the State of Iowa as a foreign corporation and conducts twelve retail department stores therein, at none of which are any activities performed with respect to mail its order sales consummated from its Chicago, Minneapolis and Kansas City establishments with residents of Iowa, it, by said act, is subjected to said tax while its direct mail order competitors cannot be so subjected, and this very fact would seriously impair respondent's mail order business with residents of the State of Iowa. Plainly, then, the record indisputably shows that the enforcement of said Use Tax Act as to respondent's mail order business at its Chicago, Minneapolis and Kansas City establishments would not only substantially burden transactions in interstate commerce, but would actually impair the free flow of such interstate commerce.

Furthermore, if the State of Iowa can enforce said Use Tax Act as to respondent's mail order business, then every other state in which respondent maintains a retail store might likewise impose such a burden. Furthermore, the

purpose of petitioners in the administration of said Iowa Use Tax Act to impair the free flow of interstate commerce is apparent from the statements contained on page 30 of petitioners' brief, where it is expresaly stated that the protection of local merchants from the competition of interstate sales, such as these mail order sales, is the objective of the law.

There can be no question under the controlling decisions of this court that the State of Iowa may exact from the users of tangible personal property imported into and which has come to rest within its borders, an excise tax because of such use, and the validity of the Iowa Use Tax Act insofar as it imposes such tax upon such users of such property is not involved in this case.

But, it is a far different thing for the State of Iowa, whether for the purpose of protecting its local merchants from interstate competition, or for any other purpose, to undertake to require this respondent to act in another state as its agent in the collection of a tax at the time of making such interstate sales in such other state; for, in so doing, the State of Iowa is placing a burden upon and regulating and impairing the free flow of interstate commerce contrary to the provisions of Section 8 of Article I of the Constitution of the United States.

And, for all of the foregoing reasons, we earnestly submit that the decision of the Supreme Court of Iowa, that said Iowa Use Tax Act as applied to the mail order business of respondent constitutes a regulation of and substantial burden upon interstate commerce and an impairment of the free flow of such interstate commerce and is therefore in violation of the provisions of Section 8 of Article I of the Constitution of the United States, which invests the Congress with exclusive power to regulate commerce with foreign nations and among the several states, is correct and should be affirmed.

CONCLUSION.

We submit, therefore, that under the facts shown by the record in this case, and for the reasons and upon the authorities hereinbefore set forth, the said Iowa Use Tax Act, as applied to the mail order business of respondent, is unconstitutional and void, and the judgment and decision of the Supreme Court of Iowa affirming the trial court in enjoining its enforcement is right and should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1940.

No. 256

LOUIS E. RODDEWIG, AS CHAIRMAN OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY; D. L. MURROW AND C. FRANK GREEN, AS MEMBERS OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY,

Petitioners,

vs.

MONTGOMERY WARD & CO. INCORPORATED,

Respondent.

BRIEF FOR RESPONDENT.

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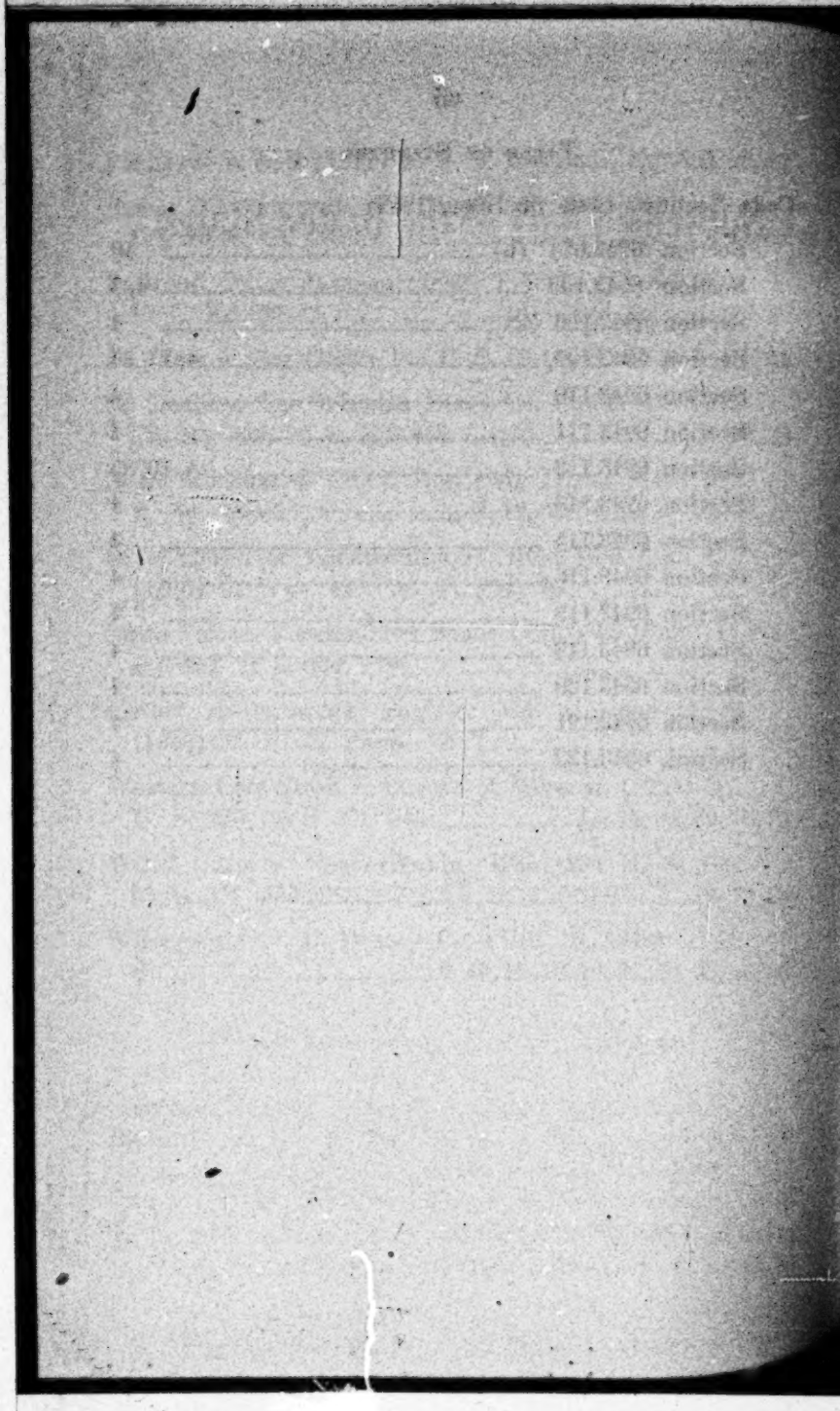

Supreme Court of the United States

October Term, 1940.

No. 256

LOUIS E. RODDEWIG, AS CHAIRMAN OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY; D. L. MURROW AND C. FRANK GREEN, AS MEMBERS OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY,

Petitioners,

vs.

MONTGOMERY WARD & CO., INCORPORATED,

Respondent.

BRIEF FOR RESPONDENT.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Iowa in this case is to be found at 292 N. W. 142 and in the record at p. 101. The opinion refers to that in *Roddewig, et al. v. Sears, Roebuck and Co.*, reported at 292 N. W. 130. (The opinion of the district court of Polk County, Iowa, is to be found in the record, beginning at p. 63.)

STATEMENT OF THE CASE.

HOW THE ISSUES AROSE.

This case arose on respondent's request of the district court of Polk County, Iowa, that petitioners be enjoined from carrying out their threat to cancel the permit previously issued respondent to operate retail establishments in Iowa (R. 12) and to seek cancellation of respondent's permit to do business in Iowa (R. 13), if respondent failed to comply with all provisions of the Iowa Use Tax Act.

The injunction was sought on the ground that certain provisions of the Iowa Use Tax Act requiring the respondent to collect from its customers the amount of the Iowa Use Tax were invalid for a number of reasons arising under the Constitutions of Iowa and of the United States.

Two of these several reasons were, first, that the burden of these provisions fell upon activities of the respondent outside the jurisdiction of Iowa, and, second, that the burden of these provisions fell upon activities in interstate commerce in such a manner as to offend against the commerce clause.

The answer of the petitioners put the several constitutional questions in issue. A trial was held, and evidence (all of it undisputed) was taken.

HOW THE ISSUES WERE DECIDED.

The district court held that the challenged provisions of the Iowa Use Tax Act were invalid because they infringed upon the rights of the respondent both under Section 1 of the Fourteenth Amendment to the Constitution of the United States and under Section 8 of Article I of that Constitution. (R. 75)

The majority of the Supreme Court of Iowa also found the challenged provisions invalid, resting the decision primarily on the Fourteenth Amendment. A minority of the Iowa Supreme Court, dissenting in part, nevertheless concurred in holding that the challenged provisions were invalid as applied to some of the fact situations disclosed by the record. This opinion was also predicated upon the Fourteenth Amendment, but for somewhat different reasons.

Neither of the courts below found it necessary to pass upon the allegations that the challenged provisions offended against certain provisions of the Constitution of Iowa. These contentions of the respondent, however, have not been waived or abandoned.

THE CHALLENGED PROVISIONS OF THE IOWA USE TAX ACT.

The respondent has never challenged the validity of the Use Tax Act in so far as it imposes a *tax* upon the use within Iowa of merchandise as to which no sales tax has been paid. The respondent has at all times limited its challenge to those provisions of the Act which impose upon retailers the burden of *collecting the tax* from those upon whom it is laid. This burden is distinct from the tax, and is part of a scheme of tax collection created by

the following portions of the Iowa Use Tax Act: sections 4, 5 (par. 2), 8, 9, 10, 11, 12, 14, 15, 17, 18, 19, 20, and 21 (these provisions are contained in Sections 6943.105, 6943.106 (2), 6943.109, 6943.110, 6943.111, 6943.112, 6943.113, 6943.115, 6943.116, 6943.118, 6943.119, 6943.120, 6943.121, 6943.122, respectively, of the Code of Iowa, 1939, and are set out in full as Appendix "B" to the petitioners' brief.) Henceforth in this brief these portions of the Use Tax Act which set forth the scheme of tax collection will for convenience be called, insofar as they relate to this scheme of tax collection, the "collection provisions", or the "challenged provisions" of the Act.

The duty of tax collection is first described in section 8 of the Act in these words:

> "Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state * * * shall, *at the time of making such sales, whether within or without the state,* collect the tax imposed by this act from the purchaser * * *." (italics added)
>
> (Sec. 6943.109 of the Code of Iowa, 1939)

In addition, the retailer may be required to give the purchaser a receipt (Sec. 8). Section 11 provides:

> "The tax herein required to be collected by any retailer * * * shall constitute a debt owed by the retailer to this state".
>
> (Sec. 6943.112 of the Code of Iowa, 1939)

Quarterly returns must be filed by the retailer covering, among other matters:

> "the sales price of any or all tangible personal property sold by the retailer during such preceding quarterly period, the use of which is subject to the tax imposed by this act".
>
> (Sec. 6943.113 of the Code of Iowa, 1939)

Penalties are provided for delay in filing returns (Sect. 17) and for failure to furnish requested information (Sect. 19). The retailer must keep such records of sales and such documentary evidence of them as may be required; which must be

> "made available within this state for such examination"

(Sec. 6943.121 of the Code of Iowa, 1939)

Failure to comply may be further penalized by revocation both of the retailer's permit to do a retail business and of its license as a corporation to do any business in Iowa.

No other guide for determining when the duty of collection arises is furnished by the statute except that

> "evidence that tangible perronal property was sold by any person for delivery in this state shall be *prima facie* evidence that such tangible personal property was sold for use in this state"

Sec. 6943.105 of the Code of Iowa, 1939)

However, the liability for collection is not limited to sales calling for delivery in Iowa. No provision is made for refund of taxes paid by a retailer if the buyer does not in fact use the merchandise within the state.

THE FACTS.

The petitioners argue that the challenged provisions are constitutional when applied to respondent's "mail order business" (See petitioners' brief, p. 5). The petitioners describe respondent's "mail order business" as follows:

> "In addition to the business conducted in Iowa, this corporation conducts a mail order business through mail order stores or establishments located outside of Iowa. From time to time mail order catalogs are sent to prospective customers in Iowa and the Iowa customers send orders by mail to such mail

order stores located outside of Iowa and the orders are there filled and the merchandise shipped to the purchasers in Iowa."

(Petitioners' brief, p. 3)

This statement is correct in a sense, but omits many important facts. Many of these omitted facts will be discussed in the course of this argument in connection with the legal questions which make them important, so no attempt will be made to list them at this point.

At the most, the passage quoted from the petitioners' brief describes in general terms only the normal "mail order sale" which precedes a use in Iowa. However, the circumstances surrounding the various sales followed by use in Iowa which make up the "mail order business" of this respondent differ from transaction to transaction. The following are some of the obvious variations:

1. A customer having an Iowa post office address may send an order to the respondent calling for delivery to himself at a freight point just outside the state of Iowa.[1]

2. A customer having a post office address in another state may send an order to the respondent calling for delivery at a freight point within the state of Iowa.[1]

3. A resident of some other state may order merchandise from the respondent to be sent to a member of his family resident in Iowa, or to be sent as a gift to a resident in Iowa.[2]

---

(1) The frequent variance between post office addresses and railroad freight points is illustrated by the provisions in the order blanks included in the catalogues. Obviously the forms must be concise yet they include a request that the shipping point be stated if it differs from the post office address. See p. 931 Exhibit B, p. 827 Exhibit C, p. 773 Exhibit D, p. 925 Exhibit E, p. 831 Exhibit F, p. 881 Exhibit G. Where the customer's residence is near the state boundary, the freight point may of course be in another state.

(2) The catalogue order blanks also include a space for giving such instructions. See p. 932 Exhibit B, p. 828 Exhibit C, p. 774 Exhibit D, p. 926 Exhibit E, p. 832 Exhibit F, p. 882 Exhibit G.

4. A customer in Iowa to whom the respondent has not sent a catalog may write for information about some particular item of merchandise and order on the strength of information sent by letter in reply to his request.[3]

5. A customer to whom a catalog has been sent to an Iowa address may order from some point outside the state of Iowa where he is vacationing, asking for shipment to his temporary address of articles he intends to use in Iowa.

6. A resident of Iowa temporarily located elsewhere to whom no catalog has been sent examines the catalog of another, sends an order to respondent calling for shipment to himself at the out-of-state point.[4]

As will be pointed out in the course of this argument, the duty of collection arises if the sale is for use in Iowa irrespective of whether the fact is known to the seller, or irrespective of whether delivery was or was not made to a point in Iowa. The Act was so interpreted by the Supreme Court of Iowa in the decision now before this Court on review.

Consequently, the duty of collection as applied to the "mail order business" of the respondent, involves the determination "at the time of making a sale" under any of the circumstances enumerated above, of the question whether the merchandise sold would later be used in Iowa. The existence of the duty of collection with respect to a mail order sale thus depends upon a fact which takes place subsequent to the time specified for the performance of the duty.

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(3) Customers are invited to write for assistance. For example see pp. 118 and 597 of Exhibit F.

(4) The references in footnote 2 equally support the variations illustrated in examples numbered 5 and 6.

We shall, in the course of argument, show more fully that the activities included or associated with the making of the "mail order sales" embraced within the issues all take place outside Iowa.

On August 1, 1938, the respondent operated 596 retail stores (R. 36) and nine mail order houses (R. 27) throughout the United States of which only 29 retail stores were located within the state of Iowa (R. 27). At least 6 of the out-of-the-state stores had trade areas extending into Iowa, and made considerable sales to Iowa customers for use in Iowa (R. 36). The amount of other sales to Iowa customers on vacation or traveling in other states, but for use in Iowa, were doubtless considerable, but obviously difficult to compute or estimate.

Sales made by out-of-state retail stores to Iowa customers are covered by the language of the Act just as much as "mail order sales". The petitioners now ask that the act not be applied to them. However, they factually parallel each characteristic of "mail order sales". Such retail store sales may have resulted from advertising literature mailed to the customer in Iowa or from advertisements placed in newspapers delivered to him in Iowa. The orders may have been placed by a telephone call to the out-of-state retail store just across the border from the home of an Iowa resident. The sales may have been consummated by placing merchandise on the truck of a carrier for delivery in Iowa (R. 36).

The evidence clearly showed that the respondent would suffer irreparable damage should the petitioners be permitted to carry out their threats, and that the respondent had no adequate remedy at law.

SUMMARY OF ARGUMENT.

I. The Application Of The Collection Provisions Of The Iowa Use Tax Act To Any Of Respondent's Sales Included Within The Issues Of This Case Would Amount To An Invalid Regulation Of Transactions Occurring Outside Of The Territorial Boundaries Of The State Of Iowa.

A. A State May Not Impose Burdens Which In Their Incidence Fall Upon Activities Outside Of The State Or Which Are Measured By Activities Not Directly Related To Privileges Exercised Within The State.

Wisconsin v. *J. C. Penney Co.* (Dec. 16, 1940) — U. S. —

St. Louis v. *The Wiggins Ferry Co.* (1871) 11 Wall. (U. S.) 423, 20 L. Ed. 192.

Ogden v. *Saunders* (1827) 12 Wheat. 213, 6 L. ed. 606.

Baldwin v. *Hale* (1864) 1 Wall. (U. S.) 223, 17 L. ed. 531.

Pennoyer v. *Neff* (1877) 95 U. S. 714, 24 L. ed. 565.

Great Atlantic & Pacific Tea Co. v. *Grosjean* (1937) 301 U. S. 412, 57 S. Ct. 772.

James v. *Dravo Contracting Co.* (1937) 302 U. S. 134, 58 S. Ct. 208.

Connecticut General Life Ins. Co. v. *Johnson* (1938) 303 U. S. 77, 58 S. Ct. 436.

Osborn v. *Ozlin* (1940) 310 U. S. 53, 60 S. Ct. 758.

Airway Electric Appliance Corp. v. *Day* (1924) 266 U. S. 71, 45 S. Ct. 12.

Lawrence v. *State Tax Commission* (1932) 286 U. S. 276, 52 S. Ct. 556.

B. The Burden Imposed By the Collection Provisions Of The Iowa Use Tax Act As Applied To Those Of Respondent's "Mail Order Sales" Embraced Within The Issues Of The Case At Bar Falls Directly Upon Transactions And Activities Outside The Territorial Boundaries Of The State Of Iowa.

1. The Supreme Court Of Iowa Has Interpreted The Iowa Statute As Imposing The Burden Of Tax Collection Upon The Activity Of Making Sales.

Wisconsin v. *J. C. Penney Co.* (Dec. 16, 1940) — U. S. —

Henderson v. *Mayor of New York* (1876) 92 U. S. 259, 23 L. ed. 543.

2. The Challenged Provisions Of The Iowa Statute By Their Explicit Terms Impose The Burden Of Collection Upon The Specific Act Of Making Sales.

3. The Actual Economic Incidence Of The Burden Of Tax Collection, As Separate And Distinct From The Burden Of The Tax Itself, Does In Fact Fall Upon The Activity Of Making Sales And Not Upon Such Other Activities As That Of Use By The Customers Within The State.

a. The Burden Of Acting As A Tax Collector Under An Obligation To Make The State Whole For Any Tax Not In Fact Collected Has Been Recognized By This Court As A Substantial One.

(Section 6943.112 of the Code of Iowa, 1939.)

Railroad Co. v. *Jackson* (1869) 7 Wall. (U. S.) 262, 19 L. ed. 88.

State Tax on Foreign-held Bonds (1873) 15 Wall. (U. S.) 300, 21 L. ed. 179.

New York, Lake Erie, and W. R. Co. v. *Pennsylvania* (1894) 153 U. S. 628, 14 S. Ct. 952.

b. The Burden Of Tax Collection Is Economically Substantial Apart From The Liability For Any Uncollected Portion Of The Tax Itself.

c. The Incidence Of The Burden Of Tax Collection Does Not Fall Upon The Activity Of Use Within Iowa, But Increases The Expense Of, And Decreases The Net Profit From, The Activity Of Making Sales.

Connecticut General Life Ins. Co. v. *Johnson* (1938) 303 U. S. 77, 58 S. Ct. 436.

4. The Activity Of Making The Sales Embraced Within The Issues Of The Present Case Occurred Outside Iowa.

5. The Entire Activity Which Included Making The Sales Embraced Within The Issues Of The Present Case Is Dissociated From The Exercise Of Any Privilege Granted The Respondent By Iowa.

St. Clair v. *Cox* (1882) 106 U. S. 350, 1 S. Ct. 354.

a. The Activities Of Purchasers From Respondent Do Not Give Jurisdiction To The State Of Iowa.

Wisconsin v. *J. C. Penney Co.* (Dec. 16, 1940) — U. S. —.

Connecticut General Life Ins. Co. v. *Johnson* (1938) 303 U. S. 77, 58 S. Ct. 436.

b. The Assumption That Intrastate Activities Take Place When No Showing As To Them Is Made Does Not Give Jurisdiction To Iowa, Especially When The Record Specifically Rebuts The Existence Of Them.

c. **The Fact That Respondent's Activities May Have Economic Repercussions In Iowa Does Not Bring Them Within The Jurisdiction Of Iowa.**

Connecticut General Life Ins. Co. v. *Johnson* (1938) 303 U. S. 77, 58 S. Ct. 436.

C. **The Measure Of The Burden Imposed By The Provisions Of The Iowa Use Tax Act Has No Proper Relation To The Value Of Any Privilege Granted The Respondent By Iowa.**

Wisconsin v. *J. C. Penney Co.* (Dec. 16, 1940) ___ U. S. ___

Ford Motor Co. v. *Beauchamp* (1939) 308 U. S. 331, 60 S. Ct. 273.

Great Atlantic & Pac. Tea Co. v. *Grosjean* (1937) 301 U. S. 412, 57 S. Ct. 524.

Equitable Life Assur. Soc. v. *Pennsylvania* (1915) 238 U. S. 143, 35 S. Ct. 829.

Compania General de Tabacos v. *Collector* (1927) 275 U. S. 87, 48 S. Ct. 100.

D. **None Of The Cases Cited By Petitioners Supports The Validity Of The Collection Provisions Of The Iowa Use Tax Act As Applied To The Facts Before The Court.**

Discussing:

Henneford v. *Silas Mason Co.* (1937) 300 U. S. 577, 57 S. Ct. 524.

McGoldrick v. *Berwind-White Coal Mining Co.* (1940) 309 U. S. 33, 60 S. Ct. 388.

Jagels "a fuel corporation" v. *Taylor* (1940) 309 U. S. 619, 60 S. Ct. 469.

McGoldrick v. *A. H. Du Grenier, Inc.*, (1940) 309 U. S. 70, 60 S. Ct. 404.

McGoldrick v. *Felt & Tarrant* (1940) 309 U. S. 70, 60 S. Ct. 404.

Pierce Oil Corp. v. *Hopkins* (1924) 264 U. S. 137, 44 S. Ct. 251.

Monamotor Oil Co. v. *Johnson* (1934) 292 U. S. 86, 54 S. Ct. 575.

Felt & Tarrant Mfg. Co. v. *Gallagher* (1939) 306 U. S. 62, 59 S. Ct. 376.

Felt & Tarrant Mfg. Co. v. *Corbett* (1938) 23 Fed. Supp. 186.

II. The Collection And Payment Provisions Of The Iowa Use Tax Statute Violate The Commerce Clause Of The Constitution.

McGoldrick v. *Berwind-White Coal Mining Co.* (1940) 309 U. S. 33, 60 S. Ct. 389.

A. State Laws Which Potentially Subject Commerce To Multiple Burdens Violate The Commerce Clause.

Western Live Stock v. *Bureau of Revenue* (1938) 303 U. S. 250, 58 S. Ct. 546.

McGoldrick v. *Berwind-White Coal Mining Co.* (1940) 309 U. S. 33, 60 S. Ct. 388.

Adams Mfg. Co. v. *Storen* (1938) 304 U. S. 307, 58 S. Ct. 913.

B. To Uphold The Collection And Payment Provisions Of The Iowa Statute Would Subject Interstate Commerce Transactions To Multiple Burdens.

C. The Cases Cited By Petitioners Are Not Cases In Which A Potential Double Burden On Interstate Commerce Appeared.

Felt & Tarrant v. *Gallagher* (1939) 306 U. S. 62, 59 S. Ct. 376.

McGoldrick v. *Berwind-White Coal Mining Co.* (1940) 309 U. S. 33, 60 S. Ct. 388.

McCarroll v. *Dixie Greyhound Lines* (1940) 309 U. S. 176, 60 S. Ct. 504.

Wiloil Corp. v. *Pennsylvania* (1935) 294 U. S. 169, 55 S. Ct. 358.

Monamotor Oil Co. v. *Johnson* (1934) 292 U. S. 86, 54 S. Ct. 575.

Western Live Stock v. *Bureau of Revenue* (1938) 303 U. S. 250, 58 S. Ct. 546.

ARGUMENT.

Introduction.

Section 8 of the Iowa Use Tax Act reads in part:

> "Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state * * * shall *at the time of making such sales, whether within or without the state,* collect the tax imposed by this act from the purchaser." (Italics added.)
>
> (Section 6943.109 of the Code of Iowa, 1939)

This section does not speak of "mail order business", "mail order transactions", or "mail order houses", although throughout petitioners' brief these terms are used as if the statute were designed and intended solely to cover such transactions or such businesses, and as if the issues in this case involved only such transactions and businesses.

The Supreme Court of Iowa did not doubt that the collection provisions of the Iowa Use Tax Act, including Section 8 quoted above, literally applied to all sales made by the respondent through any medium for use in Iowa. The majority specifically held the act unconstitutional as to sales for use in Iowa made through "so-called" border stores, thus holding it applicable to them. The dissenting opinion of Chief Justice Hamilton in the Iowa Supreme Court agreed with the majority opinion both as to the interpretation of the Act and as to its invalidity as applied to sales other than "mail order sales".

The two opinions filed in the Supreme Court of Iowa in the case of this respondent jointly decide:

1. That the collection provisions of the Iowa Use Tax Act were intended to apply to all sales made by this respondent and others similarly situated, no matter what the sales medium might be, so long as the merchandise sold was to be used in Iowa.

2. That the collection provisions of the Iowa Use Tax Act were intended to apply to all sales for use in Iowa whether the fact of that use was known to the seller or not. (Section 4 of the Act, which provides that delivery within the state is *prima facie* evidence that the sale is for use in the state, becomes not a limitation, but an added burden.)

3. That the collection provisions of the Iowa Use Tax Act are invalid when applied to many sales which fall within the literal coverage of these provisions.

None of these three findings is before this Court for review, because none of them was challenged by the petition for certiorari or discussed in petitioners' brief.

The petitioners in effect admit that the duty of tax collection cannot be enforced as to all of respondent's sales. They single out for enforcement "mail order sales" only. Such a limitation in construction raises serious questions in itself.

The distinction between "mail order sales" and other sales for use in Iowa has no relation to any possible line of demarcation between a constitutional application of the statute and one which is invalid. The facts earlier outlined show that the only invariable distinction between "mail order sales" and other out-of-state sales is that in the one case orders are received by mail and in the other they are received orally or over the telephone. Certainly no constitutional issue can turn upon so inconsequential a distinction.

Among the many questions to be decided before the result reached by the Iowa Court is rejected is whether the limitation of the challenged provisions to "mail order sales" does not require a legislative rather than a judicial decision, and whether it does not convert a statute of general application into class legislation of doubtful validity.

But the decision of the Iowa Court so clearly follows on other grounds the precedents established by this Court that we have addressed this Brief solely to two propositions:

first, that the challenged provisions are an attempted exercise of power by Iowa over matters which are not within its jurisdiction,

second, that the challenged provisions open the way for the subjection of interstate commerce to multiple burdens arising solely from the interstate character of that commerce.

I. The Application Of The Collection Provisions Of The Iowa Use Tax Act To Any Of Respondent's Sales Included Within The Issues Of This Case Would Amount To An Invalid Regulation Of Transactions Occurring Outside Of The Territorial Boundaries Of The State Of Iowa.

The Supreme Court of Iowa rested its decision upon the ground that the challenged provisions of the Iowa statute operated extraterritorially and were hence invalid:

> "The sales are consummated outside the State of Iowa in each instance. They are separate and distinct from plaintiff's activities in Iowa. The statute here challenged seeks to impose upon plaintiff the obligation that it 'shall at the time of making such sales, whether within or without the state, collect the tax imposed by this chapter from the purchaser'. The sales are made outside of Iowa and the statute requires plaintiff to collect the tax at the time the sales are made. It clearly seeks to regulate activities of

plaintiff outside the state. * * * Under repeated pronouncements of the Supreme Court of the United States, hereinbefore reviewed and quoted from, the State of Iowa has no such right."

292 N. W. at p. 135.

The answer of the petitioner's brief to the position of the Iowa Supreme Court appears to run somewhat as follows:

a. Any argument that the imposition of the duty of collecting a use tax offends against the principle of extraterritoriality is foreclosed by certain decisions of this Court. (See petitioners' brief, pp. 12-16, inc.)

b. The fact that the tax to be collected was laid upon an intrastate activity—use—makes immaterial whatever extraterritorial elements may be present. (See petitioners' brief, pp. 16-21, inc.)

c. The burden of tax collection may be properly laid upon the respondent's exercise of the privilege of doing a retail business in Iowa. (See petitioners' brief, pp. 22-26, inc.)

d. In any event, the respondent's sales for use in Iowa were so connected with intrastate activities as to justify the imposition of the burden of use tax collection. (See petitioners' brief, pp. 26-28, inc.)

For answer to the various arguments of the petitioners which we have just outlined, we propose to show:

a. A state may not impose burdens which in their incidence fall upon activities outside of the state or which are measured by activities which are not directly related to privileges exercised within the state.

b. The challenged provisions of the Iowa Use Tax are clearly within the constitutional prohibitions.

Each of the four points of the argument of petitioners will be answered in the development of these propositions.

The argument of the petitioners consistently obscures one fact which is of great importance to an understanding of the real issues before this Court. Many of the respondent's "mail order sales"—a considerable part of the respondent's "mail order business" with Iowa customers—are outside the issues of this case, since as to them the respondent had reported and collected the tax prior to requesting an injunction against the petitioners.

These "mail order sales" which are outside the issues of the case include

1. sales as to which the respondent's retail stores within the state had some connection;
2. sales solicited by order offices within the state. (R. 49)

After these exclusions, the only sales left are those which were made by out-of-the-state mail order houses and as to which the respondent's agents performed no act within the state of Iowa (R. 32, 38). The issues before this Court relate solely to such sales.

A. A state may not impose burdens which in their incidence fall upon activities outside of the state or which are measured by activities not directly related to privileges exercised within the state.

Stated in a phrase which has been frequently employed, the holding of the Supreme Court of Iowa was that the challenged provisions of the Iowa Use Tax Act are void because they operate extraterritorially. In *Wisconsin v. J. C. Penney Co.* (Dec. 16, 1940), ___ U. S. ___, this court said of the word "extraterritoriality" that it was one of several

> "compendious ways of implying the impotence of state power because state power has nothing on which to operate".

The "impotence" of extraterritorial state laws may be derived, in logic, from either of two distinct considerations of constitutional law. Because the sovereignty of a state is limited to its territory, attempts to exercise sovereignty beyond the territorial boundaries of a state are *ultra vires*. Such was the express holding in *St. Louis* v. *The Wiggins Ferry Co.* (1871) 11 Wall. (U. S.) 423, at pp. 429, 430, 20 L. ed. 192 at p. 194. Furthermore, the equality of each state with its fellow-states within the federal system requires as a necessary implication of the fundamental law of that system that the power of each be excluded from the territories of the others. Such was the reasoning of this Court in such cases as *Ogden* v. *Saunders* (1827) 12 Wheat. 213, at pp. 366 and 369, 6 L. ed. 606, at pp. 658, 659, 660; *Baldwin* v. *Hale* (1864) 1 Wall. (U. S.) 223 at p. 231, 17 L. ed. 531 at p. 533; and *Pennoyer* v. *Neff* (1877) 95 U. S. 714 at p. 722, 24 L. ed. 565 at p. 568.

While the duty of the judiciary to declare extraterritorial legislation invalid derives from either or both of these considerations, it is reinforced by the due process clause of the Fourteenth Amendment, since to act without power is to act without due process.

Before explaining the several reasons why Iowa exceeded its powers in enacting the challenged provisions, a review of some of the recent decisions will show that statutes are "extraterritorial" in character when either:

a. the incidence of the burdens imposed falls upon activities or property located outside the state; or
b. the measure of the burden imposed ostensibly upon the exercise of a privilege within the state is to be found in activities or property outside the state having no direct relation to the value of the privilege granted and exercised.

In *Great Atlantic & Pacific Tea Co. v. Grosjean* (1937) 301 U. S. 412, 57 S. Ct. 772, a tax for the privilege of engaging in retailing through more than one outlet was imposed, measured by the number of stores within the state, but at a rate determined by the total number of units everywhere operated, whether within or without the state. Recognizing the limitations upon state power, this Court said:

> "The state may not tax real property or tangible personal property lying outside her borders; nor may she lay an excise or privilege-tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed."
>
> (301 U. S., at p. 424; 57 S. Ct., at pp. 776-777)

However, the statute in question did not transgress the permissible bounds because:

> "* * * the subject of the tax in question is the prosecution of a defined business activity within the State of Louisiana. * * * The measure of the exaction is the number of units of the chain within the state. * * * The rate of tax for each such unit is fixed by reference to the size of the entire chain. * * * The law rates the privilege enjoyed in Louisiana according to the nature and extent of that privilege in the light of the advantages, the capacity, and the competitive ability of the chain's stores in Louisiana considered not by themselves, as if they constituted the whole organization, but in their setting as integral parts of a much larger organization."
>
> (301 U. S., at pp. 424-425; 57 S. Ct., at p. 777)

The relationship between Louisiana's charge for the privilege actually exercised and the opportunity of exploiting the privilege arising from the total economic strength of the recipient of the privileges was thus a direct one, in the eyes of the majority of this Court. Since the tax was a charge for a privilege actually exercised within Louisiana, and was measured by facts which

bore upon the ability of the recipient of the privilege to exploit it within Louisiana, the legislation was not extraterritorial.

However, in *James* v. *Dravo Contracting Co.* (1937) 302 U. S. 134, 58 S. Ct. 208, this Court had before it a West Virginia tax on gross income from a business part of which consisted of activities outside of that state. This Court said:

> "Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia, the state had no jurisdiction to impose the tax."
>
> (302 U. S. at p. 138, 58 S. Ct. at p. 211)

Here the real incidence of the tax, as well as its measure, rested upon extraterritorial activities.

In *Connecticut General Life Ins. Co.* v. *Johnson* (1938) 303 U. S. 77, 58 S. Ct. 436, the appellant was a foreign insurance corporation licensed to do business in California. Outside of that state, it made contracts of reinsurance with other insurance corporations licensed in California covering lives of California residents. The contracts of reinsurance called for performance outside of California. California sought to collect a tax on the premiums paid for the reinsurance. The foreign corporation was exercising a privilege in California. The business of reinsuring California lives received an indirect benefit from the protection given by the State of California to the reinsured lives of California residents. The tax was imposed as part of a general scheme which avoided double burdens by permitting the reinsured company to deduct premiums for reinsurance from gross premiums.

This Court felt, in the first place, that the incidence of the burden of the tax fell upon activities outside the jurisdiction of the state, saying:

"* * * the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls *the property and activities within its boundaries* of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere."

(303 U. S. at pp. 80, 81, 58 S. Ct. at p. 438—italics added)

The imposition of a burden upon extraterritorial activities could not be justified because the protection which California extended to those whose lives were reinsured and to the company which originally insured them inured to the benefit of the appellant:

"It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

(303 U. S. at p. 81, 58 S. Ct. at p. 438)

While the incidence of the burden of the tax upon extraterritorial activities might have sufficed to dispose of the case, this Court also met the argument that the state had the right to impose the burden of the tax upon the privilege actually exercised of doing other business

within California because the reinsurance transactions were

> "so related to business carried on by appellants in California as to be a part of it and properly included in the measure of the tax".
>
> (303 U. S. at p. 80, 58 S. Ct. at p. 438)

The economic benefits derived from the protection of the reinsured lives and of the transactions of writing the original insurance had an economic thrust upon the transactions of reinsurance outside California; but this was not enough. The relationship between the transactions of reinsurance and the privileges actually exercised within the jurisdiction of California was not of a character to sustain the tax:

> "Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance, or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection."
>
> (303 U. S. at p. 81, 58 S. Ct. at p. 438)

Just as California had no power to impose a burden upon activities which occurred outside its borders, so also did California lack the power to burden the privilege which was exercised in California with a burden measured by activities lacking any direct relation to that privilege.

The *Connecticut General* case thus emphasizes the two circumstances under which a state statute may be said to operate extraterritorially: first, when the incidence of the burden falls upon extraterritorial activities; and, second, when the measure of a burden imposed upon an

intrastate activity is determined by extraterritorial activities or values which have no direct relation to the value of the privilege actually burdened.

In *Osborn* v. *Oslin* (1940) 310 U. S. 53, 60 S. Ct. 758, foreign insurance corporations licensed to do business in Virginia challenged a Virginia statute which forbade the making of contracts of insurance by licensed companies except through resident agents who must receive at least half the usual commission. The statute was attacked on the ground that, as related to policies written outside Virginia through non-resident brokers:

> "* * * Virginia is intruding upon business transactions beyond its borders."
>
> (310 U. S. at p. 62, 60 S. Ct. at p. 761)

The court below had made extensive findings. Among them, in the language of the Court, were the following:

> "A policy, whether 'produced' by broker or agent, must be 'serviced'—an insurance term for assistance rendered a customer in minimizing his risk. To this end the companies exert themselves directly. * * * Only to a limited extent can risks be minimized at long range; *local activity is essential.* When the contract is 'produced' by a non-resident broker the 'servicing' function is normally performed by the company exclusively." (Italics added)
>
> (310 U. S. at p. 61, 60 S. Ct. at pp. 760-761)

In other words, unlike the situation involved in the *Connecticut General* case, and in addition to the existence of risks within the protection of Virginia, the contract of insurance wherever consummated contemplated the performance of acts within the state with respect to those risks. Although the contract might be made outside the state through a non-resident broker, "local activity" was "essential", and would usually be "performed by the company exclusively".

As a result, this Court found that:

> "For it is clear that Virginia has a definable interest in the contracts she seeks to regulate and that what she has done is very different from the imposition of conditions upon appellants' privilege of engaging in local business which would bring within the orbit of state powers matters *unrelated to any local interests.*"
>
> (310 U. S. at p. 65, 60 S. Ct. at p. 762) (Italics added)

Here again the nature of the relation between the transactions involved and the "local activities" within the orbit of state power was the subject of inquiry.

Virginia's legislative scheme imposed restrictions upon the conduct of a business rather than upon single acts:

> "This legislation is not to be judged by abstracting an isolated contract written in New York from the organic whole of the insurance business, the effect of that business on Virginia, and Virginia's regulation of it."
>
> (310 U. S. at p. 63, 60 S. Ct. at p. 761)

The regulation of a course of business differs materially from the imposition of burdens directly upon isolated or separable transactions. The *Osborn* case is thus one where the incidence of the burden fell upon a course of business which, while including certain extraterritorial elements such as the making of some contracts, also involved in all cases intrastate or "local activity". The incidence of the burden thus was imposed upon activities over which the state had jurisdiction. Nor could the measure of the burden—the customary charges for insuring property located within the state—be improper since

it directly related to the value of the intrastate privileges actually exercised.[5]

Wisconsin v. *J. C. Penney Co.* (Dec. 16, 1940) ... U. S. ..., also recognizes the major premise of this argument, while holding that the particular facts before the Court did not constitute a proper minor premise. A Wisconsin statute required corporations doing business within that state to pay an additional tax upon the declaration of dividends out of income derived from that state.

This Court first dealt with the holding of the Wisconsin Supreme Court that the burden of the tax fell upon the "privilege of declaring dividends"—a privilege exercised outside Wisconsin. The majority of this Court felt that:

> "The practical operation of this legislation is to impose an additional tax on corporate earnings within Wisconsin but to postpone the liability for this tax until such earnings are paid out in dividends."

Holding that,

> "For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax",

this Court determined to disregard the decision of the Wisconsin court as to the point of incidence, holding that the burden was in reality imposed upon the privilege of engaging in business in Wisconsin, just as if it had been labeled a "supplementary tax on the Wisconsin earnings of such corporations".

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5. The opinion of the three judge district court which this Court affirmed recognized and met the issue of a proper relation between the measure of the burden imposed and the value of the privilege exercised:

> "As it has been shown in the findings of fact that the contracts of the plaintiff companies on persons or property within Virginia call for or contemplate the performance of certain acts within the State, and it follows that the state has power to regulate them, the question is whether the statutory requirement that the insurance contract be made through a resident agent, who shall be paid at least one-half the commissions, has a reasonable relation to the risk covered by the contract and to the performance within the state of the obligation undertaken by the insurer".
>
> Osborne v. Ozlin (D. C., E. D., Va. 1939) 29 Fed. Supp. 71 at 82.

The sole question left was whether the measure of the tax bore a direct relation to the privileges exercised. While the imposition of the burden was postponed until an event outside the state occurred, that event had to do with the disposition of profits derived from the exercise of the very privilege upon which the burden was laid. The measure of the tax involved the profits earned within Wisconsin, and thus was directly related to the privilege burdened.

In distinguishing the *Connecticut General* case, the opinion in the *Penney* case said:

> "In the precise circumstances presented by the record it was found that the tax neither in its measure nor in its incidence was related to California transactions",

while,

> "Here, on the contrary, the incidence of the tax as well as its measure is tied to the earnings which the State of Wisconsin has made possible * * *."

The gist of these decisions is clearly that legislation is extraterritorial in operation when its actual incidence is upon transactions which do not involve the exercise of a privilege within the state, or when it seeks to impose on a privilege exercised within the state a burden measured by transactions outside the state which bear no direct relationship to the value of the privilege burdened.

The decisions of this Court throw some further light upon the relation which must exist between the measure of a burden and the privilege upon which the burden is imposed.

Airway Electric Appliance Corp. v. *Day* (1924) 266 U. S. 71, 45 S. Ct. 12, dealt with a fee charged by Ohio for the privilege of doing business in that state. In declaring

the fee invalid because of its extraterritorial operation, this Court said:

> "The fee determined by the lower court, as well as that fixed by the state officers, is arbitrary. Without holding that such a charge must be measured by the value of the privilege for which it is imposed, it may be said that some relation to such value is a reasonable requirement. * * * The number of shares not subscribed or issued has no relation to the privilege held by plaintiff in Ohio, and it is not a reasonable measure of such a fee."
>
> (266 U. S. at p. 83; 45 S. Ct. at p. 15)

Lawrence v. *State Tax Commission* (1932) 286 U. S. 276, 52 S. Ct. 556, dealt with a Mississippi income tax on a resident of that state measured by total income derived from out-of-state as well as intrastate activities. In upholding the tax, this Court said:

> "The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received. These are rights and privileges incident to his domicile in the state and to them the economic interest realized by the receipt of income or represented by the power to control it, bears a direct legal relationship."
>
> (286 U. S. at p. 281, 52 S. Ct. at p. 557)

Finally, the reasoning of this Court in *Wisconsin* v. *J. C. Penney Co.* (Dec. 16, 1940), ... U. S. ..., has provided, in the language of the opinion,

> "a reformulation of the classic approach of this Court to the taxing powers of the state".

Avoiding

> "formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize",

this Court pointed out that

> "For constitutional purposes, the decisive issue turns on the operating incidence of a challenged tax".

Consequently,

> "A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society."

Stated in other words,

> "The simple but controlling question is whether the state has given anything for which it can ask return".

While

> "The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction",

the converse must be equally true: the burden must be a charge for the protection extended "transactions within a state", and some "nexus" must exist between the events upon which the charge is conditioned or by which the amount of the charge is measured and the protection or benefits extended by the state.

This nexus or relation between the measure of a charge or exaction and the intrastate privilege upon which it is laid involves of necessity the existence of some relation between the charge and the value of the privilege granted and exercised. Only then can it be said that the state has given something for which it is asking a return.

This is the gist of the constitutional prohibition against extraterritorial state laws. We propose now to show that the prohibition applies under the "concrete circumstances" of the case at bar.

B. The burden imposed by the collection provisions of the Iowa Use Tax Act as applied to those of respondent's "mail order sales" embraced within the issues of the case at bar falls directly upon transactions and activities outside the territorial boundaries of the State of Iowa.

The petitioners nowhere take a definite position as to what privilege within the "control" of Iowa they regard as regulated or burdened, nor as to what the relation between the burden imposed and the privilege burdened may be. Instead, the petitioners at one time or another adopt three different and mutually inconsistent theories as to what activity within Iowa is burdened:

1. the use within Iowa, which is the incidence of the tax itself;[6]

2. the exercise of the privilege of doing a retail business within the State of Iowa;[7]

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6. Petitioners speak of the use tax as
"conditioned upon an event occurring within the State of Iowa, namely, Use"
(Petitioners' brief, pp. 16 and 30)
and argue as if the event of use within the state is the peg upon which the whole statute depends, saying:
"* * * under the Iowa law, the use or exercise of ownership in Iowa is the only activity taxable. It is sufficient if this activity occurs within the borders of the State. If it does, then the seller within the jurisdiction of the State must accept the burden * * * to collect the tax * * *."
(Petitioners' brief, p. 20)
Later petitioners reiterate this theory:
"Clearly, under the sales and use tax laws we need look no further than the intrastate activities which are the incidence of the tax. Once these are present, namely, use in Iowa or sale in Iowa, then the events in the transactions leading up to the incidence are all immaterial."
(Petitioners' brief, p. 21)

7. In between the passages quoted in the preceding footnote, petitioners quote a different theory from the dissenting opinion of Chief Justice Hamilton in the Iowa Supreme Court:
"Contra, the tax is laid on the privilege of use within the state, and the incidental burden of collecting the tax is upon the privi-

3. the supposed performance of acts associated with the making of mail order sales and forming with them a course of business at least partly intrastate.[8]

We propose to show that a realistic analysis of the challenged provisions and of the record discloses that the burden of tax collection actually falls upon the activity of making sales for use in Iowa and that this activity of the respondent takes place wholly outside Iowa with respect to all the sales included within the issues.

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lege granted by the state to appellee—a privilege actually made use of—to engage in the retail business within the state."
(See petitioners' brief, p. 21)

This second theory is later expounded by the petitioners:

"Rather, the State is imposing a duty upon the plaintiff to act as its agent in collecting certain taxes due it from citizens of the State of Iowa by virtue of privileges exercised and enoyed by the plaintiff within the State of Iowa, to wit, the privilege of engaging in the retail business within the State of Iowa."
(Petitioners' brief, p. 23)

A still further exposition of this theory is found later in petitioners' brief:

"This burden of collecting the tax, even if it be called a tax to be paid by the seller is not a tax upon the sale as such, but if it be called a tax, it is a license tax measured it is true by the number and amounts of sales, but it does not lose its character of a license tax or regulation imposed upon the seller in return for the privilege of doing business in the State of Iowa."
(Petitioners' brief, p. 26)

8. A third theory is advanced at another point:
" * * in any event in these mail order sales there is a good deal of intrastate activity by the mail order house."
(Petitioners' brief, p. 26)

What is meant is not that the sales involve intrastate activity, but that the sales are the result of, or associated with, or are a part of a course of business involving, intrastate activity. This is made clear by a later sentence:

"There are, of course, other obvious activities that would likely attend any business of selling, such as adjustments, credit inquiries and collection procedure."
(Petitioners' brief, pp. 27-28—emphasis added)

1. The Supreme Court of Iowa has interpreted the Iowa statute as imposing the burden of tax collection upon the activity of making sales.

The Iowa Supreme Court said:

> "The statute here challenged seeks to impose upon plaintiff the obligation that it 'shall at the time of making such sales, whether within or without the state, collect the tax imposed by this chapter from the purchaser'. The sales are made outside of Iowa and the statute requires plaintiff to collect the tax at the time the sales are made. It clearly seeks to regulate activities of plaintiff outside the state."
>
> (292 N. W. at p. 135)

The Supreme Court of Iowa thus interpreted the challenged statute as imposing the burden of tax collection upon the specific activity of "making sales". While not conclusive upon this Court in the determination of questions of constitutional power, this interpretation of a state statute by the highest court of that state is naturally entitled to great weight.

In *Wisconsin* v. *J. C. Penney Co.* (Dec. 16, 1940), ... U. S. ...., where this Court refused to accept the "descriptive pigeon-hole" into which the Wisconsin Court had placed the challenged tax, this Court did so because, quoting from *Henderson* v. *Mayor of New York* (1876) 92 U. S. 259 at p. 268, 23 L. ed. 543, at p. 547:

> " 'In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect' ".

In the case at bar, the Iowa Court's interpretation of the incidence of the burden of tax collection only recognizes, as we shall show, the "natural and reasonable effect" of the operation of the statute.

2. The challenged provisions of the Iowa statute by their explicit terms impose the burden of collection upon the specific act of making sales.

The interpretation which the Supreme Court of Iowa gave to the challenged provisions was, in truth, the obvious and the only one. The language of those provisions is neither ambiguous nor obscure. Section 8 provides that retailers subject to it and "making sales" for use in Iowa:

> "shall at the time of making such sales, *whether within or without the state,* collect the tax. * * *"
>
> (Italics added—Section 6943.109 of the Code of Iowa, 1939)

The duty of collection must, by the explicit terms of the statute, be performed *at the time* the sale is made. As the Supreme Court of Iowa pointed out:

> "Under the facts herein, the property is then without the state."
>
> (292 N. W. at p. 132)

Since the tax must be collected before the property is sent to Iowa, it must be collected before the use in Iowa takes place. It must, in fact, be collected at the seller's risk even in the absence of knowledge of an intended use in Iowa. This, as has already been pointed out, was the holding of the Supreme Court of Iowa. A shipment from St. Paul of merchandise to an Iowa customer consigned to a freight point just across the border in Minnesota might still be a sale for use in Iowa and the occasion for the performance of the duty of tax collection.

Since the act of tax collection must under the statute be performed *at the time* the sale is made, the making of the sale is the event upon which the duty is conditioned. Hence the explicit language of the challenged provisions imposes the burden upon the making of sales even when, as in the present case, those sales were made outside of the State of Iowa.

3. The actual economic incidence of the burden of tax collection, as separate and distinct from the burden of the tax itself, does in fact fall upon the activity of making sales and not upon such other activities as that of use by the customers within the state.

Two separate and distinct burdens are imposed by the Iowa Use Tax Act. One is the burden of the tax itself; the other is the burden of acting as a tax collector for the state. Since the validity of the tax itself is not involved, we are not here concerned with the first burden.

An appreciation of the fact that this second burden is a substantial and costly one, and separate and distinct from the burden of the tax itself, is necessary to a correct understanding of the real issues. Once this is realized, an examination of the statute shows that the Supreme Court of Iowa correctly identified the point of incidence of the burden.

a. The burden of acting as a tax collector under an obligation to make the state whole for any tax not in fact collected has been recognised by this Court as a substantial one.

Section 11 of the Iowa Use Tax Act provides:

> "The tax herein required to be collected by any retailer pursuant to sections eight or nine hereof, and any tax collected by any retailer pursuant to said sections, shall constitute a debt owed by the retailer to this state."
>
> (Section 6943.112 of the Code of Iowa, 1939)

The practical result of this section is to impose a burden which is the economic equivalent of the tax itself, and the Supreme Court of Iowa so recognized it:

> "Defendants contend that the tax is a tax upon the use of property in this state, is really a tax upon the purchaser and is not a tax upon the plaintiff at all.

> Perhaps from a subtle and technical standpoint this may be true, but, if true, it is unimportant. * * * From any reasonable or practical standpoint, the amount of the tax being made a debt of plaintiff, the statute at least constitutes regulation of plaintiff's activities outside the state as a condition to it being granted a license to do business in the state."
>
> (292 N. W. at p. 132)

This Court has held that the imposition of the burden of acting as a tax collector for the state may in itself amount to the burdening of extraterritorial activities. In *Railroad Co.* v. *Jackson* (1869) 7 Wall. (U. S.) 262, 19 L. ed. 88, the railroad company, a corporation of both Pennsylvania and Maryland, complied with a Pennsylvania law by withholding a tax from interest due Jackson, a bondholder not resident within Pennsylvania. Jackson sued the railroad company, and this Court held the deduction improper. The result in the *Jackson* case was approved and followed in the case of the *State Tax on Foreign-held Bonds* (1873) 15 Wall. (U. S.) 300, 21 L. ed. 179.

In *New York, Lake Erie, and W. R. Co.* v. *Pennsylvania* (1894) 153 U. S. 628, 14 S. Ct. 952, another Pennsylvania statute was before the court. Whereas in the two previous cases, the corporation was a creature of the laws of Pennsylvania, and the bondholder was a non-resident, the facts before this Court in the *Lake Erie* case were the converse. The corporation was a foreign one, holding only a license to do business in Pennsylvania, and the bondholder was a resident. The interest from which the deduction was ordered was, however, payable in New York. While in both cases the corporation was acting as a collector for the state, the collection in the *Lake Erie* case was of a tax on intangible property which was, through the residence of the owner, within the jurisdiction of Pennsylvania.

The case thus parallels closely the situation now before this Court. The state had power to levy the tax in both cases; and the corporation in both cases was amenable to the process of the state. In both cases the corporation enjoyed privileges granted by the state.

This Court said in the *Lake Erie* case:

> "The money in the hands of the company in New York, to be by it applied in the payment of interest, which by the terms of the contract is payable in New York, and not elsewhere, is property beyond the jurisdiction of Pennsylvania, and Pennsylvania is without power to say how the corporation holding such money in another state shall apply it, * * * No principle is better settled than that the power of a state, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction."
>
> (153 U. S. at p. 646, 14 S. Ct. at p. 958)

The clear applicability of the *Lake Erie* case to the facts of the present case is emphasized by the following passage:

> "It (the Pa. Statute) assumes to do what the state has no authority to do,—to compel a foreign corporation to act, in the state of its creation, as an assessor and collector of taxes due in Pennsylvania from residents of Pennsylvania."
>
> (153 U. S. at p. 645, 14 S. Ct. at p. 958)

Thus the *Lake Erie* case is one which clearly recognizes that the burden of acting as a tax collector with respect to a valid tax may be in itself invalid because it relates to extraterritorial activities exclusively.

The substantiality of the burden of insuring the collection of taxes, especially as applied to the sales of this respondent which are embraced within the issues, is independently established by undisputed testimony that the most efficient methods of collection possible in respond-

ent's business would still leave nearly 15% of the tax uncollected and payable out of the funds of the respondent. (R. 45)

b. The burden of tax collection is economically substantial apart from the liability for any uncollected portion of the tax itself.

In addition to the burden of making the state whole as to any tax it could not in fact collect, the challenged provisions would impose other burdens of a substantial character upon the respondent. The undisputed evidence was that it would cost the respondent, over and above the cost of making good the inevitable deficit in tax collections, a sum ranging from $890 to $1040 for every $10,000 of tax liability. (R. 46-47)

This evidence was not controverted, and a reading of it will demonstrate how obviously the duty of tax collection increases costs and burdens the operation of a business.

c. The incidence of the burden of tax collection does not fall upon the activity of use within Iowa, but increases the expense of, and decreases the net profit from, the activity of making sales.

One theory advanced by the petitioners, as we have seen, is that:

> "The Use Tax is conditioned upon an event occurring within the State of Iowa, namely, Use, and it is immaterial if the order was the result of personal solicitation or the approval of the order an extra-state activity."
>
> (Petitioners' brief, p. 16)

The conditioning of the tax upon an event occurring within Iowa, namely, "use", undoubtedly saves the tax itself from the charge of burdening an extraterritorial act. But

the duty of collection is, to use the petitioners' phrase, "conditioned upon an event" occurring outside the State of Iowa, namely, "the making of a sale".

Certainly jurisdiction over the activities of a customer does not in itself confer jurisdiction over the activities of a seller. If this be the case, every sale by the respondent for use in Iowa would involve the duty of collection even though the customer be on a motor trip to California and his purchase be made from one of respondent's California retail stores. The argument is akin to that rejected by this Court in *Connecticut General Life Ins. Co.* v. *Johnson* (1938) 303 U. S. 77, 58 S. Ct. 436, discussed above, where the other party to the transaction of reinsurance had solicited the original insurance in California.

This argument of petitioners therefore has meaning only if it be predicated on an assumption that the economic burden of tax collection is also shifted in fact to the user. This assumption is rebutted by the record.

The record contains testimony as to competition between the respondent and other mail order houses which do not maintain places of business within Iowa and hence are not burdened with the duty of tax collection. The record further shows that, as a result of this and other factors, the economic incidence of the cost of tax collection to the respondent cannot be shifted to purchasers in Iowa. (R. 35, 36)

The argument that the economic burden of the tax is upon the user, and hence that the seller should not complain about collecting it, loses its plausibility when the record is examined and the substantiality of the burden imposed by the duty of the tax collection is appreciated. The assumption that all taxes bear eventually only upon the consumer may have an element of speculative truth

in it, but the glib assumption that the retailer thereby escapes unscathed is too superficial to merit debate before this Court. The record in the present case shows clearly how, in a competitive economy, the duty of collecting taxes may involve heavy expenses which cannot be passed on and must be absorbed by the retailer himself.

4. The activity of making the sales embraced within the issues of the present case occurred outside Iowa.

This fact, which the record clearly proves, is apparently not disputed, for the petitioners in their "Statement of the Case" say:

> "* * * the Iowa customers send orders by mail to such mail order stores located outside of Iowa *and the orders are there filled* and the merchandise shipped to the purchasers in Iowa."
>
> (Petitioners' brief, p. 3)

Indeed, none of the three theories which the petitioners advance as to the intrastate activity to which the jurisdiction of the state attaches assumes that the sales before this Court were made in Iowa.

This is not a case where the act of making a sale is defined for purposes of the statute as including other elements than the actual transfer of title. The term "sale" is not specifically defined in the Iowa Use Tax Act, and hence must be taken in its ordinary and accepted meaning. Even the Iowa Sales Tax Act, which petitioners treat as a related statute, defines a sale merely as

> "any transfer, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration."
>
> (Par. "b", Section 6943.074 of the Code of Iowa, 1939)

The undisputed evidence shows that the respondent's ordinary mail order sales are made as follows:

"They (customers) select the merchandise, prepare an order for it, usually on an order blank that is provided in the catalog, specify the article, number, description and price and send the order with remittance to the mail order house. The remittance being for the cost of the merchandise and the transportation."

(R. 29)

"Generally the customers followed the instructions in the book in sending in their orders."

(R. 31)

"The customer designates the method of transportation and he either remits at the time of the order or the order is sent C. O. D. or the Company extends credit."

(R. 31 and 32)

"Some orders are not filled for the reason that we do not have the merchandise in stock or the customer fails to give specifications as to size or color, etc."

(R. 32)

"No employee of the mail order house lives within the State of Iowa, and there are no acts done within the State of Iowa in regard to any of the orders sent to the mail order house."

(R. 38)

These facts clearly establish that the respondent's "mail order sales" are made and consummated at the various mail order houses by acceptance of customers' orders, appropriation of merchandise and delivery to a common carrier selected by the customer, shipment being at the cost of the customer.

Such was the finding of the Iowa Supreme Court, which said:

"Section 6943-109 requires that the tax be collected when the sale is made. Under the facts herein, the property is then without the state."

(292 N. W. at p. 132)

And again:

> "The mail order sales, however, do not constitute activities within the State of Iowa, nor do such sales constitute doing business within the state. *The sales are consummated outside the State of Iowa in each instance.*"
>
> (292 N. W. at p. 135)

The fact that the "mail order sales" which are in issue were "made" outside the State of Iowa is thus demonstrated by the record, admitted by the petitioners, and found by the Supreme Court of Iowa.

5. The entire activity which included making the sales embraced within the issues of the present case is dissociated from the exercise of any privilege granted the respondent by Iowa.

While the incidence of the burden of tax collection clearly falls upon the transactions of making sales, and these transactions are outside Iowa, the completely extraterritorial character of the challenged provisions is emphasized by the fact that the whole course of business of which these transactions form a part is conducted outside Iowa. As the Supreme Court of Iowa said:

> "If the plaintiff limited its activities to conducting a mail order business such as shown by the record herein, it would not be doing business in this state and the state could not require it to secure a license to do business here."
>
> (292 N. W. 130 at p. 132)

What the Iowa court had in mind was clearly the absence of any intrastate elements in the business in question.

Beginning at p. 26 of petitioners' brief is a discussion headed:

> "If intrastate activity in connection with the sale for use in Iowa be thought necessary, then such activity is present in this case."

After stating that:

> "• • • In these mail order sales there is a good deal of intrastate activity by the mail order house." (Petitioners' brief, p. 26)

petitioners rely upon a passage from the dissenting opinion of Chief Justice Hamilton in the Iowa Supreme Court as "enumerating" the intrastate activities of the mail order houses.

An analysis of this passage shows that the argument of petitioners depends in each instance upon one or the other of three fallacies:

a. the gratuitous assumption of facts which are in most cases specifically rebutted by the record;
b. the failure to distinguish between conduct taking place in Iowa and the effect within Iowa of conduct taking place elsewhere.
c. the failure to distinguish between jurisdiction over the activity of one party to a transaction and jurisdiction over the activity of the other.

The passage quoted from the dissenting opinion refers to these supposed intrastate activities:

a. "the activity of the retailer • • • soliciting business from Iowa residents by means of distribution of • • • catalogues."
b. "The activity of the purchaser within the State of Iowa • • • (in) making out the order, enclosing the purchase price, the carrying charge (and the requisite tax, if the law was obeyed), and placing the order in the mail. • • • "
c. "The activity of the purchaser within the State of Iowa • • • after receipt of the goods, making use of them."
d. "The use of the express company or the United States mail instead of its own motor trucks" in the respondent's distribution of catalogs.

e. "making adjustments in case of damaged, soiled, misfit or defective merchandise, or * * * the exchange of the merchandise * * * which might require, in the adjustment, return of a portion of the purchase price paid."

f. "credit or installment business (which) might even require court action to repossess the property."

(See quotation in petitioners' brief, p. 27)

To this list may possibly be added the additional element which the petitioners have erroneously assumed as concomitant with all "mail order sales";

g. shipment of merchandise to purchasers in Iowa.

(See petitioners' brief, p. 3)

Before specifically examining the several items of this list, one point may well be mentioned. While a foreign corporation may own property within a state, and this property is consequently within the jurisdiction of the state, all questions of state jurisdiction which do not relate to such property depend upon the existence of *activities* within the state by *agents* or *employees* of such foreign corporation. This is because of the incorporeal character of a corporation, which prevents a state from basing jurisdiction upon the physical presence of a corporation in the same manner as it may base jurisdiction for appropriate purposes on the physical presence of an individual within the state.

> "The case is unlike that of suits against individuals. They can act by themselves, and upon them process can be directly served, but a corporation can only act and be reached through agents."
>
> (*St. Clair* v. *Cox* (1882) 106 U. S. 350, at p. 356, 1 S. Ct. 354, at p. 359)

Since a state's jurisdiction over foreign corporations for all purposes not satisfied by the mere ownership of property within a state depends upon activities of a corpora-

tion performed through its agents within the state, the question of the state's jurisdiction over such activities depends upon identical considerations.

a. The activities of purchasers from respondent do not give jurisdiction to the State of Iowa.

In the list above, items "b" and "c" are activities of the purchaser and not of the respondent. Obviously activities such as use within Iowa by purchasers from respondent do not require the exercise by the respondent of a privilege granted by Iowa.

Iowa extends protection to its citizens, and all businesses within the confines of the United States, wherever conducted, will to a greater or less extent, profit from the economic well-being of such an important segment of the national life. But the several states cannot, by such a circumstance, extend their powers to exact a contribution from all who may in some indirect fashion benefit from the protection which the state has provided for its own citizens.

The test is whether the one upon whom the charge is placed has received the "protection, opportunities, and benefits given by the state" (*Wisconsin* v. *J. C. Penney Co.* (Dec. 16, 1940) .... U. S. ..... The act of making out an order in Iowa or of using merchandise in Iowa receives the protection of Iowa; but the protection is extended to the citizen of Iowa who is charged for the privilege by the imposition of a use tax. The indirect benefits which the mail order company receives are primarily due to the "protection, opportunities, and benefits given by the state" in which the mail order house is located. The situation changes only when the agents of the respondent, in the handling of the business of making such sales, perform acts which receive the "protection, opportunities, and benefits" extended by Iowa.

In *Connecticut General Life Ins. Co.* v. *Johnson* (1938) 303 U. S. 77, 58 S. Ct. 436, the fact that the companies which dealt with the appellant had acted in California in securing the insurance reinsured by appellant was held not to bring the activity of reinsurance within the jurisdiction of California. This Court pointed out that the fact that the other party to a transaction may be engaged on his part in an intrastate activity no more than demonstrates the "ultimate thrust of the economic benefits and burdens of transactions within the state" beyond the boundaries of the state.

b. The assumption that intrastate activities take place when no showing as to them is made does not give jurisdiction to Iowa, especially when the record specifically rebuts the existence of them.

Items "e" and "f" on the petitioners' list of supposed intrastate activities are purely speculative. The record contains these uncontroverted statements:

> "No employee of the mail order house lives within the State of Iowa and there are no acts done within the State of Iowa in regard to any of the orders sent to the mail order house. The company has no means of collecting any amounts or sums, or any machinery presently set up for collecting any sums from Iowa customers by individuals within the State of Iowa, * * *."
>
> (R. 38)[9]

The several catalogs introduced into evidence contain the following instruction to customers describing the manner in which adjustments are handled:

> "* * * Whatever you buy from us must please you in every way * * * or you may return it and we will

9. Even if credit sales contemplated the performance of acts of collection within Iowa, they could be separated and the collection provisions separably applied, since credit sales amount to only 18% of the mail order business (R. 40).

either exchange it for what you want or refund all you paid, including transportation charges both ways."

(See p. 6, Exhibits B, C, and D, and similar language at p. 7, Exhibits E, F, and G)

The catalogs contain further instructions concerning returned merchandise, which clearly establish that adjustments are made by mail at the mail order house, and that agents are not sent into the State of Iowa for this purpose.

c. The fact that respondent's activities may have economic repercussions in Iowa does not bring them within the jurisdiction of Iowa.

The remaining items of supposed intrastate activity are all examples, not of acts performed within Iowa, but of the economic effects in Iowa of acts performed outside of Iowa.

The supposed "solicitation" of mail order sales by the presence of catalogs in Iowa is a case in point. Petitioners argue:

"The activity of soliciting sales cannot be a question of degree. We only argue that there is evidence of solicitation for orders on the part of the mail order house. This is the only conceivable distinguishing characteristic between the mail order sale and the sale in the *Felt & Tarrant* case. That this activity of soliciting of orders by the catalog method is effective is amply demonstrated by the volume of mail order business done."

(Petitioners' brief, p. 27)

Here petitioners treat the presence in Iowa of respondent's catalogs as if it were the equivalent of acts of personal solicitation of business. Similarly, Chief Justice Hamilton said:

"* * * by this means appellee displays its merchandise, its prices, and gives its sales talk to Iowa customers. * * *"

(292 N. W. at p. 139)

But the distribution of catalogs in Iowa in fact involves no act of the respondent and its agents within the State of Iowa. The catalogs are all printed in Chicago (R. 93, 95), distributed by mail to Iowa customers (R. 40) "from the three mail order houses" (R. 86) which serve the state. No title to the catalogs is reserved in the respondent (see the several catalogs introduced as exhibits); and like all advertising material they become the property of the customer to do with as he chooses. The State of Iowa extends no protection to the respondent in the performance of any act with respect to them; nor does it even protect any property of the respondent.

Certainly, the acts of employees of the United States Government in carrying catalogs through the mails are not acts of the respondent receiving the protection of the State of Iowa.

The presence of catalogs in Iowa as a result of the acts of mailing them performed by respondent's agents outside of Iowa produces economic results; but the effect of the presence of those catalogs is not the legal equivalent of the presence of agents of the respondent soliciting sales while receiving the protection of the state.

Certainly if the economic repercussions of activities within the state upon transactions outside the state do not bring those latter transactions within the jurisdiction of the state (see, as already pointed out, *Connecticut General Life Ins. Co.* v. *Johnson*, (1938) 303 U. S. 77, 58 S. Ct. 436), the converse must be equally true. In these days of complex economic life, the effect of any activity

may transcend state boundaries; but our political organization would break down if every state could exercise jurisdiction as broad as the repercussions arising from the interaction of economic activity within it with economic activity elsewhere.

C. The measure of the burden imposed by the challenged provisions of the Iowa Use Tax Act has no proper relation to the value of any privilege granted the respondent by Iowa.

What has been said demonstrates, we submit, that the challenged provisions of the Iowa Use Tax Act are extraterritorial in operation because they impose burdens directly upon activities performed entirely outside Iowa.

Petitioners argue at one point, however, that the duty of tax collection is a burden placed upon the privilege of doing a retail business in Iowa. The theory is variously stated. The dissenting opinion of Justice Mitchell in the Iowa Supreme Court rested entirely on the statement that the burden of tax collection was not "unreasonable" and hence could be made a condition precedent to the "grant" of "the privilege of doing business in Iowa". (292 N. W. at p. 137) The dissenting opinion of Chief Justice Hamilton expresses the same thought in somewhat different language:

> "In the instant case, Iowa has granted the appellee two privileges: (1) the privilege of doing business as a foreign corporation, and (2) the privilege of operating a retail merchandising business within the state. These privileges granted furnish a * * * substantial basis for upholding and sustaining the burden imposed. * * *"
>
> (292 N. W. at p. 139)

The petitioners' brief contains a division headed:

> "The power to impose the duty of collecting the tax upon the seller in consideration of the grant of privilege to the seller to engage in the retail business in Iowa is not prohibited by the due process clause * * *."
>
> (Petitioners' brief, p. 22)

The adoption of this argument would require this Court to disregard the decision below, the plain language of the statute, and the economic facts which show that the burden of tax collection adds to the cost of making sales outside the state and falls solely upon activities which involve the exercise of no privileges granted by Iowa.

But even should this Court decide, as in *Wisconsin* v. *J. C. Penney Co., supra,* that the "operating incidence" actually fell upon the doing of business in Iowa, no argument so far advanced by the petitioners has shown any relation between the measure of the burden imposed and the privilege of doing business in Iowa. No such relation in fact exists, even in a speculative sense.

The burden of tax collection is measured by the amount of sales made outside the state for use in Iowa. This measure has no relation whatsoever to the value of the privilege of doing business in Iowa.

No showing is made in the record as to the comparative volume of the mail order sales to Iowa customers and the retail sales made within Iowa. No showing is made that the volume of mail order business with Iowa customers increases in any way the amount of retail business done within the state or the profit in that business. The record contains undisputed evidence that no such relation does in fact exist.

Only 25% of the merchandise carried by the respondent's retail stores in Iowa is duplicated identically in the

mail order houses (R. 27); conversely only about 2% of the mail order merchandise is duplicated identically in the retail stores (R. 27). In other words, the existence of the retail stores in Iowa could not improve the buying power of the mail order houses except with reference to 2% of the mail order merchandise; and the small number of Iowa retail stores (29—R. 27) against the total operated by the respondent (598—R. 36) means that the economic effect, if any, of the operation of retail stores in Iowa on the mail order business would be infinitesimal.

The respondent's retail business is operated by a different organization and personnel from the mail order business (R. 38). Separate bookkeeping is employed for the two branches (R. 28). The mail order business competes in securing Iowa business with other similar companies which are not licensed in Iowa and hence are not covered by the Iowa Use Tax Act (R. 35, 36). The respondent conducted a mail order business with Iowa customers for many years before operating any retail stores in Iowa (R. 27, 28, and 85). Its store operations in Iowa were handled by a separate and subsidiary corporation for six years after the opening of the first Iowa retail store (R. 28 and 39). The prices of merchandise in the retail stores are generally higher than prices of mail order merchandise, because "retail service is more expensive than mail order service" (R. 42). The retail stores in Iowa were not intended to act as a leader and enlarger for the mail order business (R. 95).

Nor in the face of these facts could the volume of mail order business with Iowa customers be said to affect the amount of retail store sales within Iowa. Only 2% of the merchandise sold by mail orders duplicates retail store merchandise and could contribute to future sales of retail merchandise by educating Iowa customers in its use. The

differences in merchandise, in price, and in buying habits involved in the two types of selling negatives the existence of a reciprocal relation. On the contrary, the lower mail order prices might indeed tend to divert business from the stores and to decrease the value of the privilege of operating the stores.

Nor can it be argued that the retail stores in Iowa are necessarily benefited by the purchasing power generated by mail order sales to Iowa customers. The dissimilarity in merchandise sold negatives such an inference; furthermore, the respondent's purchasing power would be a product of its total business which might decrease at the same time its mail order sales to Iowa customers increased.

At the one point where the two businesses do in fact overlap—the mail order sales solicited by retail stores—the tax has been collected and paid.

All of these facts tend to show that the mail order business is not dependent in any way, for profits or for its existence, upon the exercise of privileges granted by the State of Iowa and that the retail business conducted in Iowa is equally independent of the mail order business.

The lack of relation between the "mail order sales" for use in Iowa and the privilege of making retail sales in Iowa is emphasized by the fact that in every way the connection between out-of-the-state retail sales, not covered by the statute if construed in accordance with petitioners' request, and the intrastate business of the respondent is closer than the relation of the mail order sales. The similarity of merchandise, prices and selling practices might create a remote relation between the amount of such sales and the value of the privilege exercised in Iowa. Other retailers in competition with the respondent—the ten cent store chains, the hardware chains, and the department chains,—might make out-of-

state sales to Iowa customers; no added burden would be laid on the privilege they exercise despite the identity of type of sale. But this respondent, who happened to make sales by mail less comparable with its normal business would be heavily burdened in consequence. This element of arbitrariness emphasizes the lack of a proper relation.

The petitioners cite a number of cases in support of their theory that the burden may be upheld as imposed on the privilege of doing a retail business in Iowa. These decisions in fact tend to emphasize the impropriety of petitioners' suggestion.

The first case (also cited in the dissent of Justice Mitchell in the Iowa Supreme Court) is *Ford Motor Co.* v. *Beauchamp* (1939) 308 U. S. 331, 60 S. Ct. 273. This case involved a "charge * * * for the opportunity to transact" an "intrastate business", and the Court said:

> "In laying a local privilege tax, the state sovereignty may place a charge upon that privilege for the protection afforded. When that charge, as here, is based upon the proportion of the capital employed in Texas, calculated by the percentage of sales which are within the state, no provision of the Federal Constitution is violated."
>
> (308 U. S. at p. 335; 60 S. Ct. at p. 275)

The only extraterritorial aspect was the effect of property outside the state upon the taxing formula. This Court said:

> "The weight, in determining the value of the intrastate privilege, given the property beyond the state boundaries is but a recognition of the very real effect its existence has upon the value of the privilege granted within the taxing state."
>
> (308 U. S. at p. 336, 60 S. Ct. at p. 276)

The relation between the measure of the privilege and the value of the privilege was too obvious to require much discussion. The need for such a relation is emphasized by the insistence upon it.

The second case cited by petitioners in support of their theory is *Great Atlantic & Pacific Tea Co.* v. *Grosjean* (1937) 301 U. S. 412, 57 S. Ct. 524. As elsewhere pointed out, this case was decided on the ground that the measure of the tax imposed bore a direct relation to the value of the opportunity extended the appellant in exploiting the license granted it by Louisiana. Such a relation does not exist in the present case.

The third of petitioners' citations is *Equitable Life Assur. Soc.* v. *Pennsylvania* (1915) 238 U. S. 143, 35 S. Ct. 829, where premiums on Pennsylvania lives, including those paid by mail to a point outside the state, were taken as the measure in levying a charge upon the privilege of doing an insurance business within Pennsylvania. This Court said:

> "The tax is a tax upon a privilege actually used. The only question concerns the mode of measuring the tax."
>
> (238 U. S. at p. 147, 35 S. Ct. at p. 830)

The incidence of the tax was clearly upon an intrastate activity; the problem was solely the relation between the measure employed and the value of the privilege exercised:

> "As to that a certain latitude must be allowed. It is obvious that many incidents of the contract are likely to be attended to in Pennsylvania, such as payment of dividends when received in cash, sending an adjuster into the state in case of dispute, or making proof of death. * * * It is not unnatural to take the policy holders residing in the state as a measure without going into nicer, if not impracticable, details."
>
> (238 U. S. at p. 147, 35 S. Ct. at p. 830)

In other words, the relation was found in the fact that the contracts of insurance (which may have been solicited within Pennsylvania) contemplated activity within that

state although premiums under them were paid outside the state; and this activity was embraced within, and consequently enhanced the value of, the privilege exercised within the state.

The fourth and last case cited by the petitioners is *Compania General de Tabacos* v. *Collector* (1927) 275 U. S. 87, 48 S. Ct. 100. A tax upon premiums paid outside the taxing jurisdiction by an insured who performed within the taxing jurisdiction acts leading to the contracts of insurance might, as the dissent in that case pointed out, have been based on the jurisdiction over those activities. However, the majority found that

> "* * * this tax placed upon the assured must ultimately be paid by the insurer, and treating its real incidence as such, the question arises whether making *and carrying out* the policy does not involve an exercise or use of the right of the London Company to do business in the Philippine Islands under its license, because the policy covers fire risks on property within the Philippine Islands which may require adjustment *and the activities of agents in the Philippine Islands* with respect to settlement of losses arising thereunder. This we think must be answered affirmatively under *Equitable Life Soc.* v. *Commonwealth of Pennsylvania*. The case is a close one. * * *"
>
> (275 U. S. at p. 98; 48 S. Ct. at p. 104—italics added)

The *Equitable Life Assurance Soc.* case, the *General de Tabacos* case, and *Osborn* v. *Ozlin*, discussed earlier, all are predicated on the local and intrastate activity assumed or proven to be associated with an insurance contract on lives or property within the State. Such activity was more or less assumed in the first two; in the last, this Court relied on actual proof.

In the *Connecticut General* case, no such assumption was made, nor would it have been reasonable. In the present case, the assumption would be both unreasonable and opposed to the uncontradicted evidence. The grounds upon which a relation was assumed in the *General de Tabacos* case were doubted by the court; in the present case not even a doubtful guess can in honesty be hazarded.

D. None of the cases cited by petitioners supports the validity of the collection provisions of the Iowa Use Tax Act as applied to the facts before the Court.

In the course of their argument, petitioners cite a number of decisions in support of their general proposition that the challenged provisions "do not amount to extraterritorial operation of the Iowa law". Many of these decisions have already been discussed and shown to support the argument of the respondent. So that the position of the respondent may be entirely clear, we propose to discuss the rest of them briefly.

a. *Henneford* v. *Silas Mason Co.* (1937) 300 U. S. 577, 57 S. Ct. 524.

This case involved simply the validity of use taxes themselves, when payable by the user. No argument as to extraterritoriality was or could be made. The measure of the tax was the purchase price, which may have been determined in extrastate transactions; but this is so clearly a measure of the value of the privilege of use that the necessary relation between the measure of the charge and the value of the privilege required no demonstration.

b. *The New York City sales tax cases.*

The petitioners devote more time to a discussion of four cases decided by this Court involving the validity of a so-called "sales tax" imposed by New York City than

to any other decisions (see petitioners' brief, pp. 16-21 inclusive):

McGoldrick v. *Berwind-White Coal Mining Co.* (1940) 309 U. S. 33, 60 S. Ct. 388.

Jagels "c[illegible] fuel corporation" v. *Taylor* (1940) 309 U. S. 619, 60 S. Ct. 469.

McGoldrick v. *Al H. Du Grenier, Inc.* (1940) 309 U. S. 70, 60 S. Ct. 404.

McGoldrick v. *Felt & Tarrant* (1940) 309 U. S. 70, 60 S. Ct. 404.

(The last two cases were decided with a single opinion.)

In these four cases the attack on the validity of the tax raised but one question, as this Court pointed out:

> "* * * whether the * * * tax * * * as applied to respondent infringes the commerce clause of the Federal Constitution."
>
> (309 U. S. at p. 41; 60 S. Ct. at p. 390)

Thus these cases have no bearing upon the issue of extraterritoriality which we are now discussing.[10]

Nor could any argument of extraterritoriality have been made against the tax. It was, as this Court pointed out,

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10. Respondent's brief to this Court in the Berwind-White case raised but two points: first, that the "tax" amounted to a burden on interstate commerce in violation of the commerce clause; and, second, that the "tax" was distinguishable from the "use taxes" previously held valid (See that brief, p. 19).

Neither of the two documents filed with this Court by Jagels makes any argument about the burden of tax collection or about extraterritoriality.

In the Du Grenier case, the record and the briefs contain no mention of the burden of tax collection, nor any reference to extraterritoriality.

In the Felt & Tarrant case, the brief of respondents at p. 2 states the "question presented" as: "Are sales of goods manufactured in Chicago, Illinois, by an Illinois corporation, which is not authorized to do business in the State of New York, subject to the New York City 'sales tax' * * *". While the brief does speak incidentally of the "compulsion * * * forcing an Illinois corporation to act as a collecting agency for the City", no separate argument is made on this point.

"* * * conditioned upon events occurring within the state, either transfer of title or possession of the purchased property, or an agreement within the state, 'consummated' there, for the transfer of title, or possession."

(309 U. S. at pp. 43-44; 60 S. Ct. at p. 391)

In each of the four cases, the party attacking the tax had engaged in intrastate activity with respect to the sales involved. In the *Berwind-White* case, a sales office was maintained within the city, all the contracts of sale were made within the city, and all the deliveries (except in connection with two transactions as to which this Court made no decision) were made within the city by the seller.[11] In the *Jagels* case, all deliveries were made by *Jagels* within the city.[12] Whether the sales were solicited there does not clearly appear.[13] In the *Du Grenier* case, all sales involved were solicited and all sales contracts

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11. See the statements in Respondent's brief to this Court in the Berwind-White case:

"All of respondent's contracts for the sale of coal to New York City customers are made in New York City (R. 76)"

(Respondent's brief, p. 4)

"* * * Respondent for the last forty years has maintained its own delivery system; it has owned and still owns railroad cars, barges, and tugboats, used in carrying the coal from the mines to the plants and steamships of its customers (R. 30, 31)".

(Respondent's brief, p. 7)

12. While the only papers filed in his Court by Jagels were a "Statement as to Jurisdiction", and a "Petition for Rehearing", the fact stated appears:

"In the case at bar possession of the coal was transferred within the city of New York".

(Petition for rehearing, p. 9)

13. The statement of petitioners in the case at bar at p. 17 of their brief that "the order was not apparently the result of personal solicitation by salesmen of the Jagels Company" is gratuitous. In the "Statement as to Jurisdiction" filed by Jagels in this Court it was said:

"It maintains for the convenience of its salesmen, an office, called a 'sales office', in New York City".

(Statement as to Jurisdiction, p. 3)

While the individual orders were in some instances 'phoned or mailed directly to Jagels' New Jersey office, doubtless these orders were part of a course of business obtained and serviced by personal calls by Jagels' salesmen.

were given to the agents of *Du Grenier* within the city.[14] In the *Felt & Tarrant* case all orders were solicited within the city and delivered from the New York office of *Felt & Tarrant's* local agent.[15]

These four cases are thus irrelevant on three distinct grounds: no issue of extraterritoriality was argued to or considered by this Court; no issue of extraterritoriality was presented by a tax which was both conditioned and measured by activities within the taxing jurisdiction; and no issue of extraterritoriality could have been presented because the activity of making the sales included substantial intrastate elements.

But an even more vital distinction between them and the present case can be drawn. This distinction turns upon the difference between the burden of a tax and the burden of acting as a tax collector from those on whom a tax is laid. The Iowa Use Tax Act imposes two distinct burdens: the burden of the use tax itself, which falls upon the Iowa purchaser and the activity of use within Iowa; and the other burden of acting as a tax collector for the state of Iowa which falls upon the seller and its activities outside Iowa. The respondent is not attacking the right and power of Iowa to impose a use tax, but is attacking the power of Iowa under the facts shown by the record to place upon it the separate and distinct burden and expense of acting as an agent of the state outside the state.

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14. See the record filed in the Du Grenier case before this Court, at pages 3, 34, 35, and 37. Respondent's brief in the Du Grenier case contained four points. The first three all stated reasons why the "tax" burdened interstate commerce. The fourth attempted to distinguish Felt & Tarrant Mfg. Co. v. Gallagher (1939) 306 U. S. 62, 59 S. Ct. 376. The respondent's brief asked that, if the "tax" be not found violative of the commerce clause, the case be remanded to the state court for consideration of the question of construction of the enabling Act. This was done.

15. See the record filed in this Court in the Felt & Tarrant case, p. 39.

While in the New York City "sales tax" cases the attack upon the statute was made by parties who were tax collectors rather than taxpayers, the attack nevertheless was solely upon the validity of the *tax*. No showing was made that the burden of acting as a tax collector was substantial; apparently no argument was made upon the validity of the collection provisions separate and apart from the validity of the tax itself. Certainly no such argument was considered or discussed by this Court.

The opinion of this Court in the governing case (the *Berwind-White* case) speaks of "the question for decision" as "whether the New York city *tax* laid upon sales of goods for consumption" as applied to respondent "infringes the commerce clause" (309 U. S. at p. 41; 60 S. Ct. at p. 390). The opinion further points out that:

> "The ultimate burden of the *tax*, both in form and in substance, is thus laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price."
>
> (309 U. S. at p. 43; 60 S. Ct. at p. 391—italics added)

This Court recognized that:

> "The duty of collecting the tax and paying it over to the Comptroller is imposed on the seller in addition to the duty imposed upon the buyer to pay the tax to the Comptroller when not so collected."
>
> (309 U. S. at p. 44; 60 S. Ct. at p. 391)

but the whole opinion is concerned with the validity of the tax as determined by its incidence upon the *purchaser*. The tax was held valid because:

> "It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser, *within the state*, which is the taxable

event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and *brought to its journey's end.* Such a *tax* has no different effect upon interstate commerce than a *tax on the 'use'* of property which has just been moved in interstate commerce * * *."

(309 U. S. at p. 49; 60 S. Ct. at pp. 393 and 394—italics added)

To this last sentence this Court significantly cites such decisions as *Monamotor Oil Co.* v. *Johnson* (1934) 292 U. S. 86, 54 S. Ct. 575, *Henneford* v. *Silas Mason Co.* (1937) 300 U. S. 577, 57 S. Ct. 524, and *Felt & Tarrant Mfg. Co.* v. *Gallagher* (1939) 306 U. S. 62, 59 S. Ct. 376, showing, especially by its reliance upon the *Silas Mason* case, how clearly the ultimate incidence of the tax upon the purchaser influenced the result. Another passage is equally significant:

"* * * we can find no adequate basis for distinguishing the present tax laid on the sale or purchase of goods *upon their arrival* at destination at the end of an interstate journey from the tax which may be laid in like fashion on the property itself."

(309 U. S. at p. 52, 60 S. Ct. at pp. 395 and 396—italics added)

The emphasis on the fact that the journey must end before the tax attaches shows how important the fact of incidence upon purchaser rather than seller appeared to this Court to be.

A final quotation will serve to show that, throughout, the issue turned upon the validity of the *tax* upon the purchaser rather than the burden of *tax collection* placed upon the seller:

"Here the tax is conditioned upon a local activity delivery of goods within the state upon their purchase for consumption. It is an activity which, apart from its effect on the commerce, is subject to the state taxing power."

(309 U. S. at p. 58, 60 S. Ct. at p. 398)

The *Berwind-White* and allied cases thus were limited to a discussion of the validity of a tax laid obviously upon intrastate activities, and measured by the price paid for the merchandise used, a measure with a direct relation to the value of the privilege of use. In consequence, no conflict between them and respondent's argument in the present case can possibly exist.

c. *Pierce Oil Corporation* v. *Hopkins* (1924) 264 U. S. 137, 44 S. Ct. 251

An Arkansas statute required the seller of gasoline for use in the state to collect a use tax. The statute was aimed at local and intrastate sales since it provided for reports by counties of "sales made within the county" and for payment of "the taxes accrued thereon" (See 264 U. S. at p. 138; 44 S. Ct. at p. 251). The validity of imposing the burden of collection was argued separately from questions as to the validity of the tax:

> "* * * the mere process of collecting the tax from the purchaser, and making monthly reports and payments, subjects the seller to an appreciable expense."
>
> (264 U. S. at p. 139; 44 S. Ct. at p. 251)

But the imposition of the duty to collect was upheld as a regulation of the intrastate business of selling—a local activity obviously involving exclusively the exercise of a privilege granted by the state:

> "* * * a state which has, under its Constitution, power to regulate the business of selling gasoline (and doubtless, also, the power to tax the privilege of carrying on that business) is not prevented by the due process clause from imposing the incidental burden."
>
> (264 U. S. at p. 139; 44 S. Ct. at p. 251)

Hence no question of extraterritoriality was or could have been decided.

d. *Monamotor Oil Co.* v. *Johnson* (1934) 292 U. S. 86, 54 S. Ct. 575.

This case involved two types of transactions: first, shipments of gasoline purchased outside the state, shipped to the Monamotor company within the state, and there sold by it; second, shipments from points in Oklahoma direct to customers of Monamotor in Iowa. The part of the decision with which the present case is supposed to conflict begins a few sentences before the end of page 94 of 292 U. S., fills nearly half of page 95 (54 S. Ct. at p. 579), and ends with the following clause quoted by the dissenting opinion in the present case:

> "* * * and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant."

This passage related, as the opening sentence makes clear, to shipments direct from Oklahoma to customers in Iowa. The opinion does not clearly disclose all the pertinent facts which led the Court to say what it said. The shipments in question were made to Iowa customers "upon their orders taken in Iowa, and the gasoline to fill such orders was shipped direct from Oklahoma." (Pp. 78 and 79 of the Brief of Appellant in the *Monamotor* case before this Court) The passage quoted thus referred to sales comparable to those made by respondent's order offices in Iowa, as to which respondent has collected the use tax, and which are not in issue in the present case.

The statute before this Court in the *Monamotor* case was described in the opinion of this Court:

> "The law defines 'distributor' as 'any person who brings into the state * * * any motor vehicle fuel to be used within the state or sold or otherwise disposed of by him within the state for use in the state'. * * * It

is declared unlawful to conduct the business of a distributor unless * * * a license is procured permitting the conduct of that business. Every distributor is required * * * to file with the state treasurer a report showing the total number of gallons imported by him * * * and at the same time to remit to the treasurer the amount of the license fee * * *."

(292 U. S. at p. 89; 54 S. Ct. at p. 576)

The burden of tax collection consequently fell upon the privilege of acting as a distributor "within the state"; the measure was the amount of gasoline "imported by him" "to be sold or otherwise disposed of by him within the state". The privilege was exercised within the state and even the measure of the exaction contained no elements which did not involve intrastate activity embraced within the privilege. The case deals with an entirely different statute and an entirely different factual situation from the case at bar.

e. *Felt & Tarrant Mfg. Co.* v. *Gallagher* (1939) 306 U. S. 62, 59 S. Ct. 376.

This case was decided upon the authority of the *Monamotor* decision. The facts are comparable with the facts in the *Monamotor* decision. The sales of *Felt & Tarrant* were made on orders solicited within California by two general agents. The trial court found this to be an intrastate activity of *Felt & Tarrant*:

"The allegations of the bill respecting this phase of the case fully warrant the conclusion that plaintiff's method of doing business includes maintaining at least two places of business in California."

(*Felt & Tarrant Mfg. Co.* v. *Corbett* (1938) 23 Fed. Supp. 186, at p. 191)

But the intrastate activities of *Felt & Tarrant* were not limited to the mere solicitation of orders:

"Sometimes machines are forwarded directly to the purchasers, while in other instances, in order to

secure reduced freight charges, large groups of machines are shipped to the general agent who makes delivery to the respective purchasers."

(23 Fed. Supp. at p. 188)

Apparently the freight was paid by *Felt & Tarrant*. Records of customers were kept in California (See the Record filed with this Court, p. 27). The incidence of the burden of tax collection thus fell upon an activity which was substantially carried on within the State of California.

Summary.

The issue in the present case is not the validity of the use tax imposed by Iowa upon those who use respondent's merchandise within the state of Iowa, but the validity of an imposition of a different character—the burden of collecting this tax from respondent's customers.

The task of collection is an onerous one, involving expenses to the respondent over and above the respondent's liability for those portions of the tax which it fails to collect. These expenses equal a substantial portion of the tax itself.

The economic position of the respondent prevents it from passing the burden of this expense on to the consumer. Both physical difficulties inherent in the respondent's business, and the fact that direct competitors in the mail order field have no such burden, prevent the respondent from adjusting its prices upward to absorb the added expense. The practical as well as the formal incidence of the burden of tax collection therefore falls upon the respondent.

The burden placed upon the respondent is not a proper charge for any privilege exercised by the respondent and extended by Iowa.

If the burden be considered as a charge for the privilege of making sales for use in Iowa, the privilege is not one which receives protection from the state of Iowa, since the making of those sales occurs outside Iowa. Nor is the privilege in any direct way related to the exercise of an Iowa privilege, since all activities of the respondent in any way connected with the sales in issue occur outside Iowa.

The incidence of the imposition is upon activities over which Iowa has no control. The actual incidence of the burden is too clear to permit any claim that the burden may be justified as if laid on some other privilege. But if the burden be considered as a charge for the privilege of doing a retail store business in Iowa, no possible argument can be advanced that the measure of the charge relates to any protection extended by Iowa.

When the significance of the distinction between the burden of a tax and the burden of tax collection is fully realized, so also is the direct parallelism between the issue here presented and that decided in the *Connecticut General* case. All of the reasoning of the latter case urges the same conclusion upon the facts of the present case.

We respectfully submit that the consistent reasoning of this Court in its recent decisions, when applied to the facts here presented, leads to the conclusion that the Iowa Supreme Court decided the case rightly, and in the only manner which deference to the decisions of this Court permitted.

II. The Collection And Payment Provisions Of The Iowa Use Tax Statute Violate The Commerce Clause Of The Constitution.

Another argument, which is entirely separate and distinct from that of extraterritoriality, supports the result reached by the Supreme Court of Iowa. The burden of tax collection is so laid on the interstate commerce of the respondent as to place this commerce at a competitive disadvantage compared with intrastate commerce and hence offends Section 8, Clause 3, Article I of the Constitution.

Again the distinction between the economic burden of the use tax itself, which falls upon the purchaser within Iowa, and the economic burden of the duty to act as tax collector, which falls upon the respondent, is the determining element. Petitioners' brief, so far as it discusses the commerce clause, nowhere distinguishes between the two burdens and reads as if respondent's challenge was directed against the tax rather than against the additional burden of tax collection.

Assuming what is no longer a subject of debate, that use taxes do not infringe upon the federal power to regulate commerce no matter how momentarily the "taxable incident" follows the movement in commerce (such as the transfer of possession at the moment of delivery in *McGoldrick* v. *Berwind-White Coal Mining Co.* (1940) 309 U. S. 33, 60 S. Ct. 388), the question still remains whether a different but still substantial burden may be imposed upon a seller in interstate commerce.

The respondent submits that the burden of tax collection imposed upon it by the Iowa Use Tax Act, so far at least as concerns the sales included within the issues before this Court, is one which potentially subjects those sales to multiple burdens not imposed on intrastate trans-

actions. This argument is equally valid whether the burden of insuring tax collection in full, be considered the economic equivalent of the tax, or whether the added expense of collection be regarded as an independent charge for the privilege of engaging in the interstate commerce. In any event, the incidence of the burden is upon the activity of selling in commerce, and that activity is subject with equal right to a privilege charge in the other state or states in which the same commerce in its converse aspects takes place.

A. State laws which potentially subject commerce to multiple burdens violate the commerce clause.

In *Western Live Stock* v. *Bureau of Revenue* (1938) 303 U. S. 250, 58 S. Ct. 546, while recognizing that "commerce shall bear its share of local taxation", this Court further stated that:

> "* * * it shall not, on the other hand, be subjected to multiple tax burdens merely because it is interstate commerce."
>
> (303 U. S. at p. 259, 58 S. Ct. at p. 550)

The tax in that instance was upheld because it was

> "* * * not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution * * *."
>
> (303 U. S. at p. 260, 58 S. Ct. at p. 550)

Referring to gross receipt taxes, the Court said:

> "The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable in point of substance, of being imposed, * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."
>
> (303 U. S. at p. 255, 58 S. Ct. at p. 548)

Furthermore, the Court noted that:

> "All the events upon which the tax is conditioned * * * are beyond any control and taxing power, which, without the commerce clause, those states could exert through its dominion over the distribution * * *. The dangers which may ensue from the imposition of a tax measured by gross receipts derived directly from interstate commerce are absent."
>
> (303 U. S. at p. 260, 58 S. Ct. at p. 551)

The dangers ensuing from taxing the gross receipts from interstate transactions are of course the dangers that the tax if sustained,

> "would leave each state through which the commerce passes free to subject it to a like burden not borne by intrastate commerce."
>
> *McGoldrick* v. *Berwind-White Coal Mining Co.* (1940) 309 U. S. 33, at p. 57, 60 S. Ct. 388, at p. 398.

The danger was deemed present in *Adams Mfg. Co.* v. *Storen* (1938) 304 U. S. 307, 58 S. Ct. 913. This Court said:

> "The vice of the statute * * * (is) * * * that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids."
>
> (304 U. S. at p. 311, 58 S. Ct. at p. 916)

B. To uphold the collection and payment provisions of the Iowa Statute would subject interstate commerce transactions to multiple burdens.

The sales involved in this case are sales over which other states may clearly exercise regulatory jurisdiction if they are removed from the protection of the commerce

clause on such grounds as those urged by petitioners. Both the contracts of sale and the sales themselves occurred outside the territorial limits of the State of Iowa. The tax collection required by the statute must necessarily be made at points outside the boundaries of Iowa. The states where the sales are made have a more obvious jurisdiction than Iowa to regulate the conduct sought to be controlled by Iowa unless the commerce clause protects such conduct from state regulation.

On the same reasoning as that advanced by the petitioners, Illinois could levy a charge for the privilege of making mail order sales to Iowa customers. As the sales are made in Illinois, the territorial jurisdiction of Illinois could not be questioned. The respondent would thus be subjected to regulation of the same conduct by two states. The burdens (whether of tax collection or tax payment) would be identical in incidence, but only interstate commerce would be subject to the double burden. Local enterprises, being regulated by only one state, would be given a competitive advantage over competitors engaged in interstate commerce.

The proposition is this: respondent is engaged in the activity of selling merchandise. Because of the fact that the respondent's merchandise is sold for use in Iowa, the respondent's activity of selling is subjected to a burden by Iowa—the burden of collecting the Iowa use tax. Because of the fact that respondent's activity of selling takes place in some other state, the same activity may be subjected to another burden imposed by the other state. The ability of both states to burden the activity of selling, if it is not withdrawn by the commerce clause, arises from the fact that the selling takes place in interstate commerce. But when the ability to impose a burden more than once arises out of the fact of commerce across state lines, then the commerce power of the Federal government extends its protection to prevent the double burden.

A clearer case for the application of the principles consistently recognized by this Court could hardly be imagined.

C. The cases cited by petitioners are not cases in which a potential double burden on interstate commerce appeared.

The petitioners cite, during the discussion of the interstate commerce point, only the four New York City "sales tax" cases, and *Felt & Tarrant* v. *Gallagher* (1939) 306 U. S. 62, 59 S. Ct. 376. In addition, and without comment, four other decisions of this Court, and three state court decisions, are cited to the point in petitioners' "Summary of Argument". The salient points of the decisions of this Court will be briefly mentioned in demonstration of their inapplicability.

a. *The four New York City "sales tax" cases.*

The inapplicability of the New York City "sales tax" cases is apparent from the discussion of them earlier in this brief. As *McGoldrick* v. *Berwind-White Coal Mining Co.* (1940) 309 U. S. 33, 60 S. Ct. 388, points out, the incidence of the New York City "sales tax" was upon the purchaser for use. It was imposed only after events in New York City had succeeded the passage in interstate commerce, and, to this Court,

> "Such a tax has no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved in interstate commerce. * * *"
>
> (309 U. S. at p. 49, 60 S. Ct. at p. 394)

Certainly the purchaser could not be taxed by the state in which the movement in commerce started, since he was not within the jurisdiction of that state. So far as his purchase was concerned, it took place solely in New York City.

The incidence of the tax thus fell neither on the commerce nor upon the one who engaged in the commerce.

The cold truth is that the sellers in the four cases which reached this Court were more interested in attacking the tax than they were in attacking the burden of collection. Their position differs from the respondent. Whether the state of Iowa would eventually lose a cent of revenue if the decision of the Iowa Supreme Court be upheld by this Court is entirely speculative. The respondent is not asking, as the sellers in the New York City sales tax cases did ask, that this Court strike down a tax. All the respondent asks is that it be relieved of a burden which is onerous and real, and which is a charge upon the actual exercise of the privilege of engaging in interstate commerce which other states touched by that commerce might with equal right duplicate.

b. *Felt & Tarrant Mfg. Co.* v. *Gallagher* (1939) 306 U. S. 62, 59 S. Ct. 376.

In this case, the interstate commerce took place only at the option of the seller who actually made many of the deliveries from bulk shipments to its agents within California. The interstate commerce was thus incidental to the sale and the decision is comparable in reasoning to that of *Wiloil Corp.* v. *Pennsylvania* (1935), 294 U. S. 169, 55 S. Ct. 358, to be discussed shortly.

c. *McCarroll* v. *Dixie Greyhound Lines* (1940) 309 U. S. 176, 60 S. Ct. 504.

A state tax on gasoline in excess of twenty gallons in the tanks of trucks in interstate commerce when entering Arkansas was held in this case to bear no reasonable relation to the privilege of use of the Arkansas highways and hence void. This Court recognized that the carrier was exercising a state privilege—use of the highways—

for which it could exact a charge; but this Court found any relation between the charge levied and the privilege exercised to be absent. The concurring opinion contains this interesting passage on the relation that must exist between the measure of a charge and the privilege on which it is laid:

> "It must appear on the face of the statute or be demonstrable that the tax as laid is measured by or has some fair relationship to the use of the highways for which the charge is made."
>
> (309 U. S. at p. 181; 60 S. Ct. at p. 506)

The Arkansas tax was bad because:

> "That the relationship between tax and highway use does not in fact exist as the business is now conducted is demonstrated by appellant's showing * * *."
>
> (309 U. S. at p. 181, 60 S. Ct. at p. 507)

How this decision can in any way support the petitioners' argument is nowhere apparent.

d. *Wiloil Corp.* v. *Pennsylvania* (1935) 294 U. S. 169, 55 S. Ct. 358.

A Pennsylvania tax on liquid fuels "used or sold and delivered by distributors within this Commonwealth" was levied on fuel sold through an agent within Pennsylvania for delivery in Pennsylvania. The price quoted was "f. o. b." an out-of-state point. The tax was levied on fuel actually shipped to the purchasers from the out-of-state point. This Court said:

> "The inference that might be drawn from the f. o. b. order, the billing and straight bill of lading that the parties intended delivery to purchaser at place of shipment is negatived by other circumstances. * * * Appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania. It is the practice in appellant's business to sell f. o. b. at a specified place in

order to fix the price and such billing may be merely price fixing * * *. Upon these considerations, the state Supreme Court held that the liquid fuels in question were by appellant 'sold and delivered' * * * in Pennsylvania."

(294 U. S. at pp. 173-174, 55 S. Ct. at pp. 359)

Consequently,

"These contracts did not require or necessarily involve transportation across the state boundary."

(294 U. S. at p. 174, 55 S. Ct. at p. 359)

Hence this Court concluded that the tax, being laid in consequence of the intrastate activities of sale and delivery, was not invalidated by seller's decision to ship the merchandise prior to delivery in interstate commerce. The rule permitting state taxation of goods at rest after interstate transportation was invoked by analogy:

"* * * it is not material whether the tax is upon the sale and delivery or upon the property."

(294 U. S. at p. 175, 55 S. Ct. at p. 360)

The final conclusion was:

"As interstate transportation was not required or contemplated, it may be deemed as merely incidental."

(294 U. S. at p. 175, 55 S. Ct. at p. 360)

In the case at bar, interstate commerce is always contemplated in connection with the "mail order sales" before this Court, and the carrier is selected by the buyer who pays the freight. No possibility of a double burden existed in the *Wiloil* case; the possibility is obviously and persistently present in the case at bar.

e. *Monamotor Oil Co.* v. *Johnson* (1934) 292 U. S. 86, 54 S. Ct. 575.

This case also involved a burden placed upon a seller within the state. While an advance payment of taxes later to be collected from the user was required monthly

as to all gasoline imported for sale within the state, the burden was upon the sale and distribution by the seller after the interstate commerce had ended. Even in the isolated case of shipments direct from Oklahoma to the buyer's address, the transfer of possession apparently did not take place until the shipment was ended or else the seller would not have been the "importer" within the meaning of the taxing statute. (The reports, as this Court noted, called on the distributor to report the gallonage "imported *by him* during the preceding calendar month".)"

The burden, just as in the *Wiloil, Felt & Tarrant*, and New York City "sales tax" cases, thus fell upon activities intrastate in character which included elements occurring after interstate commerce had ended and the property and activities had ceased to be under the protection of the commerce clause. Obviously no problem of multiple burden arises under such circumstances.

f. *Western Live Stock* v. *Bureau of Revenue* (1938) 303 U. S. 250, 58 S. Ct. 546.

We have cited this case as one of our principal authorities for the proposition that interstate commerce cannot be subjected to the possibility of duplicate burdens. This Court held that:

> "In the present case the tax is, in form and substance, an excise conditioned on the carrying on of a local business. * * * "
>
> (303 U. S. at p. 257, 58 S. Ct. at p. 549)

The measure of the tax was held proper because

> "The tax is not one which in form or substance can be repeated by other states in such manner as to

---

18. See the discussion of the Stevenson case in the district court's opinion below at R. 72 and 73.

lay an added burden on the interstate distribution of the magazine."

(303 U. S. at p. 260, 58 S. Ct. at pp. 550-551)"

Summary.

The vital point in the case at bar is the distinction, clearly drawn by the pleading and the facts, between the burden of the tax which in theory at least falls upon the buyer, and the burden of collecting the tax.

The burden of having to act as a tax collector for the state of Iowa is one which the respondent, because of its competitive situation as well as because of the nature of its business, cannot shift to the consumer by a covering increase in prices.

---

17. Three state cases are also cited by the petitioners:

a. State Board of Equalization v. Blind Bull Coal Co. (1940) 55 Wyo. 428, 101 Pac. (2nd) 70

Here a sales tax on the buyer was required to be collected by the seller. The seller was engaged solely in intrastate activities, delivering coal at the pit mouth to buyers. The purchasers then transported it into other states for consumption. However,

"The sales contracts did not involve any extrastate orders nor require interstate deliveries, but were made and fully performed in this state."

(101 Pac. (2d) at p. 71)

Here the transaction was completed before the interstate commerce began. Obviously the tax contained no treat of multiple burdens arising out of the commerce.

b. Hollis & Co. v. McCarroll (Ark. 1940) 140 S. W. (2d) 420

This case simply held, on the authority of the Berwind-White case, that a consumer's sales tax was due even though the retailer charged with the duty of collection, filled orders when merchandise was not carried in stock by sending them to third party manufacturers and distributors in other states for shipment direct to the customer. No distinction between the burden of the tax and the burden of collection was apparently argued to the court, which based its decision upon the "essential intrastate characteristics" of the sales transactions, saying:

"The contracts of purchase were made in this state. In each case appellant's undertaking was to supply the merchandise and the customer's obligation was to pay appellant. The transaction was consummated in Arkansas. The point from which shipment was made was merely incidental and of no concern to appellant's customer."

(140 S. W. (2d) at p. 423)

Such a holding obviously has no relevance to the problems presented by the case at bar.

c. United Autographic Register Co. v. McGoldrick, 21 N. Y. Sup. 1 (New York S. C., App. Div.—June 28, 1940)

This case arose under the New York City "sales tax", and involved solely the question of the interpretation of the tax act, validity being assumed. What logical relationship to the issue of constitutionality petitioners may think it possesses is impossible of ascertainment.

The burden of having to act as a tax collector is imposed upon the respondent and those similarly situated because of the carrying on of a retail business through the device of interstate mail orders. The burden consequently falls directly upon activities which constitute interstate commerce.

The burden is thus placed upon the privilege of engaging in such commerce and necessarily conflicts with the intent of the Founders to free that commerce from legislative barriers erected by the several states.

Stated another way, the burden is placed upon an activity which, because of its interstate commerce character, comes equally if not more clearly within the jurisdiction of other states. If the imposition of such a burden upon an activity of this character be upheld, other states may impose burdens of comparable weight upon the same activity with equal right.

If the privilege of selling Iowa customers may be made the subject of a charge by Iowa, the same privilege which is physically performed entirely within other states can be the subject of a charge by those other states which extend protection to it.

But this activity, except for its interstate commerce character, would normally be subjected to a single charge by a single state.

The challenged provisions of the Iowa Use Tax Act thus fall directly within the class of legislation which this Court has condemned because of its discriminatory effect on interstate commerce—legislation which may result in double burdens on interstate commerce made possible solely because of the fact of interstate commerce.

For this reason, independently of all other considerations, the result reached by the Supreme Court of Iowa was proper.

CONCLUSION.

The two propositions just advanced have been fully argued. They are the answers to the arguments of the petitioners.

But several other constitutional questions were raised by the pleadings, or are necessarily involved under the limiting construction of the challenged provisions for which the petitioners contend. Some of them are:

1. Does not the application of the challenged provisions solely to "mail order sales" amount to more than a construction of the statute to save its constitutionality? In other words, haven't the petitioners asked this Court to perform a legislative rather than a judicial task? Is not such a question one for the state court to decide?
2. Does not the application of the challenged provisions solely to "mail order sales" raise a serious doubt as to the validity of a classification between retailers making out-of-state sales for use in Iowa by mail and retailers equally within the jurisdiction of Iowa who make out-of-the-state sales for use in Iowa in other ways? Does not a statute involving such a classification which has no substantial basis in fact offend against the Fourteenth Amendment? Does not a statute so construed offend against various provisions of the Constitution of Iowa?
3. Does not the duty to collect a tax which arises at a time when the liability for the tax itself is not known, especially in the absence of provisions for refund of sums improperly collected, amount to a burden so uncertain and arbitrary as to be in itself offensive to the provisions of both the State and Federal Constitutions?
4. Does not the fact that the challenged provisions apply only to out-of-the-state sales and sales in inter-

state commerce, and that the burden imposed is heavier than imposed on intrastate retailers under the Iowa Sales Tax Act, make the burden one which discriminates against commerce between the states and within the other states?

5. Does not the fact that the statute imposes the burden on the seller of ascertaining what the purchaser of merchandise intends to do with it make the burden of tax collection on out-of-the-state sales or sales in interstate commerce a burden which discriminates against commerce between the states?

To discuss the arguments with which the affirmative of each of these propositions might be supported would lengthen this brief beyond proper limits. These other questions are present in the case, however, and deserve consideration if the result reached by the Iowa Court is in any doubt.

We have not discussed the supposed needs of Iowa which dictated the adoption of the challenged provisions. We believe them to be largely suppositious. But we live under a system of laws in which the needs of government, however great and urgent they may appear at the moment to be, must be balanced against certain fundamental limitations of power which are an integral part of the structure of government. The case at bar is one where every presumption in favor of the validity of a state law may be indulged in and still the answer must, on the logic of the latest pronouncements of this Court, be against the statute.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 255.

FRED W. NELSON, as Chairman of the Iowa State Tax Commission, et al.,
Petitioners,

vs.

SEARS, ROEBUCK AND CO.,
Respondent.

PETITION FOR REHEARING.

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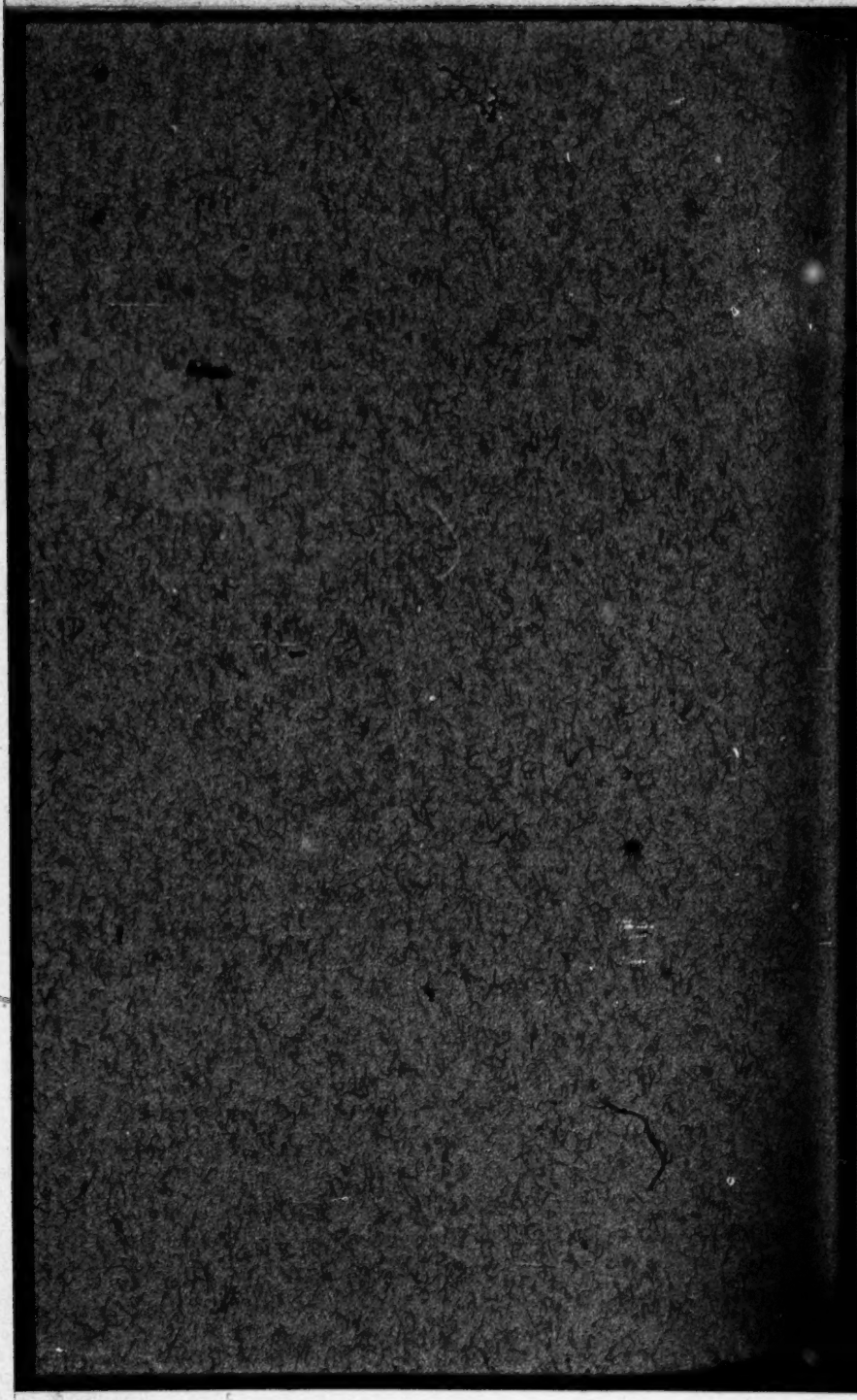

IN THE

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vs.

SEARS, ROEBUCK AND CO.,
Respondent.

PETITION FOR REHEARING.

Comes now the above-named respondent, Sears, Roebuck and Co., and presents this, its petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

BRIEF STATEMENT OF THE CASE.

This suit sought to enjoin the petitioners, as members of the Iowa State Board of Assessment and Review from enforcing as against respondent, Sears, Roebuck and Co., insofar as its purely interstate mail order sales to residents of Iowa are concerned, the provisions of Chapter 198 of the Laws of the Forty-seventh General Assembly of Iowa, commonly known as the "Use Tax Act", and from taking

steps to cause the revocation of its permit to do business within the State of Iowa as a foreign corporation or to cancel licenses which had been issued to it as a retail merchant in connection with the operation of its twelve retail stores in Iowa.

The respondent maintained that the Iowa Use Tax Act, as applied to the interstate mail order business of respondent, operated extra-territorially and regulated activities of respondent performed wholly without the confines of the State of Iowa, and is unconstitutional and void because it is in contravention of the due process clause of the 14th Amendment to the Constitution of the United States, and is further a burden upon interstate commerce contrary to the provisions of Section 8 of Article I of the Constitution of the United States. The pertinent provisions of the act and the statement of facts are found on pages 3 to 13 of respondent's brief in this court.

GROUNDS UPON WHICH THE PETITION IS BASED.

I.

This Court Erred in Assuming That the Sales in Controversy in This Case Were a Part of Respondent's Iowa Business When in Fact the Iowa Supreme Court Had Expressly Found That These Sales Were Wholly Unrelated to Respondent's Iowa Business.

Argument in Support of Ground No. I.

In the majority opinion this court makes this statement:

"Yet these orders are still a part of respondent's Iowa business. * * * Respondent cannot avoid that burden though its business is departmentalized. Whatever may be the inspiration for these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually

solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts."

In making this statement, this court indulges in an assumption which is not only contrary to the facts disclosed by the record in this case, but which is also directly contrary to the facts as found by the Iowa Supreme Court. In its opinion the Iowa Supreme Court, speaking through Mr. Justice Miller, makes the following statement:

> "The mail order sales, however, do not constitute activities within the State of Iowa, nor do such sales constitute doing business within the state. The sales are consummated outside the State of Iowa in each instance. They are separate and distinct from the plaintiff's activities in Iowa. The statute here challenged seeks to impose upon plaintiff the obligation that it 'shall at the time of making such sales, whether within or without the state, collect the tax imposed by this chapter from the purchaser'. The sales are made outside of Iowa and the statute requires plaintiff to collect the tax at the time the sales are made. It clearly seeks to regulate activities of plaintiff outside the state. Under the provisions of Section 6943.122, defendants seek to cancel plaintiff's license as a retailer in this state and its permit to do business here as a foreign corporation for failure to pay a debt which constitutes a regulation of its activities outside of Iowa."

This quotation is a definite and succinct statement that these mail order sales are wholly extra-territorial in nature; that they in no way represent any activity upon the part of respondent in the State of Iowa, and that they do not constitute doing business within that state. The assumption to the contrary indulged in by this court is therefore in total and direct conflict with the finding of fact made by the Iowa Supreme Court, and it is an assumption in which this court should not indulge. It has been repeatedly held that in cases coming from a state court, this court does

not review questions of fact but accepts the conclusions of the state tribunals as final.

Chrisman v. Miller, 197 U. S. 313; 49 L. ed. 770.
Mackay Telegraph & Cable Co. v. Little Rock, 250 U. S. 94; 63 L. ed. 863.
Smiley v. Kansas, 196 U. S. 447; 49 L. ed. 546.
Interstate Amusement Co. v. Albert, 239 U. S. 560; 60 L. ed. 439.

This latter case is indeed pertinent because it demonstrates the finality of a finding by the Supreme Court of the State of Tennessee that a certain corporation was "doing business in that state". In its opinion the court said:

> "It is settled that such findings of fact, in ordinary cases other than those arising under the 'contract clause' of the Constitution, are binding upon this court. * * *
>
> There being adequate support in the record for the finding of the supreme court of the state that plaintiff in error was doing business in the state, other than interstate commerce, without complying with the statute quoted, the contentions based upon the commerce clause and the due process clause alike must fall."

Under the above case the question of whether or not a corporation is "doing business" within a state is a question of fact to be finally decided by the state supreme court. In the *Interstate Amusement* case there was a finding by the state supreme court that the corporation was doing business within the state of Tennessee, and this court acknowledged that that finding of fact was final. In the instant case the Supreme Court of Iowa has found that respondent's mail order sales do not constitute doing business within the state of Iowa, and are not a part of respondent's Iowa business. Why is this finding of fact not entitled to the same weight as the finding of the Tennessee Supreme Court in the *Interstate Amusement Co.* case? No suggestion is made by this court that the state court's findings were not adequately supported by the record. Instead, this court has

ignored the findings of fact made by the state court and has rested its conclusions upon unjustified assumptions. Because the sales in question are interstate in character and because they are unrelated to any portion of respondent's Iowa business, it follows that the act in question is unconstitutional and the judgment of the Iowa Supreme Court should be affirmed.

II.

The Court Erred in Holding that, Because the State of Iowa Had Extended to Respondent the Privilege of Doing Business in Iowa as a Foreign Corporation, it Has the Power at a Later Date to Withdraw This Privilege if Respondent Refused to Comply With the Provisions of this Unconstitutional Exaction.

Argument in Support of Ground No. II.

In its opinion, this court states that because respondent had qualified as a foreign corporation to do business in Iowa and in fact was doing business in that state in its retail stores, the State of Iowa had the power at a later date, as a price for enjoying this privilege, to exact a tax upon its interstate transactions which are wholly unrelated to any phase of its Iowa business. Until the decision in this case, it had been firmly established that the privilege granted to a corporation to carry on business within a state could not be withheld or withdrawn solely because the corporation failed to perform duties required under an unconstitutional legislative enactment. In this case, the State of Iowa, having first granted the respondent the privilege of doing business in Iowa, later decides to withdraw this privilege because respondent does not collect and pay a tax upon mail order sales which are unrelated to its Iowa business. The mail order portion of respondent's business is interstate in character and it cannot be regulated, or bur-

dened, or taxed, simply because it so happens that respondent enjoys the privilege of doing another type of business in that state.

That the mail order portion of respondent's business is interstate in character and not subject to regulation, is indeed demonstrated by the opinion of this court itself. In this opinion the following statement is found:

> "Respondent, however, insists that the duty of tax collection placed on it constitutes a regulation of and substantial burden upon interstate commerce and results in an impairment of the free flow of such commerce. It points to the fact that in its mail order business it is in competition with out-of-state mail order houses which need not and do not collect the tax on their Iowa sales. *But those other concerns are not doing business in the state as foreign corporations.* Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price." (Italics ours)

Here, then, is a definite finding that other corporations making sales by mail in exactly the same manner as the mail order sales made by respondent, cannot be made the collectors of this tax because these other corporations are not doing business in Iowa. But neither is respondent doing business in Iowa with respect to the mail order sales here in question. Respondent's mail order sales are just as interstate in character as are those of other corporations which happen not to be qualified to do business in Iowa. Under the repeated holdings of this court these sales cannot be taxed solely because of the fact that respondent has qualified to do business in the state of Iowa.

See—

Terral v. Burke Construction Co., 257 U. S. 529 (overruling *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246).

Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426; 70 L. ed. 664, in which the court, speaking through the late Mr. Justice Holmes, said:

"Coming then to the merits we assume in favor of the defendants that the state has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result. *Frick v. Pennsylvania*, June 1, 1925 (268 U. S. 473, 69 L. ed. 1058, 42 A. L. R. 316, 45 Sup. Ct. Rep. 603); *American Bank & T. Co. v. Federal Reserve Bank*, 256 U. S. 350, 358, 65 L. ed. 983, 989, 25 A. L. R. 971, 41 Sup. Ct. Rep. 499; *Badders v. United States*, 240 U. S. 391, 394, 60 L. ed. 706, 708, 36 Sup Ct. Rep. 367; *United States v. Reading Co.*, 226 U. S. 324, 357, 57 L. ed. 243, 254, 33 Sup. Ct. Rep. 90. Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court. (*Terral v. Burke Constr. Co.*, 257 U. S. 529, 66 L. ed. 352, 21 A. L. R. 180, 42 Sup. Ct. Rep. 188); or to tax it upon property that by established principles the state has no power to tax (*Western U. Teleg. Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190), and other cases in the same volume and later that have followed it; or to interfere with interstate commerce (*Sioux Remedy Co. v. Cope*, 235 U. S. 197, 203, 59 L. ed. 193, 197, 35 Sup. Ct. Rep. 57; *Looney v. Crane Co.*, 245 U. S. 178, 188, 62 L. ed. 230, 235, 38 Sup. Ct. Rep. 85; *Western U. Teleg. Co. v. Foster*, 247 U. S. 105, 114, 62 L. ed 1006, 1016, 1 A. L. R. 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 436). A state cannot regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the company has tracks and does business in the state making the attempt. *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 U. S. 628, 646, 38 L. ed. 846, 852, 14 Sup. Ct. Rep. 952.

The case last cited was one of an attempt to regulate the corporation's payments in another state. By

the same principle on even stronger grounds the corporation cannot be prevented from employing and paying those whom it needs for its business outside the state."

See also—

New York Life Ins. Co. v. Head, 234 U. S. 149, 164; 58 L. ed. 1259.

Connecticut General Life Ins. Co. v. Johnson, 303 U. S. 77; 82 L. ed. 673.

The decision in the instant case departs from precedent of many years' standing. It should be reargued so that the importance of the principles which are being overturned can again be presented to this court.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Iowa Supreme Court be, upon further consideration, affirmed.

Respectfully submitted,

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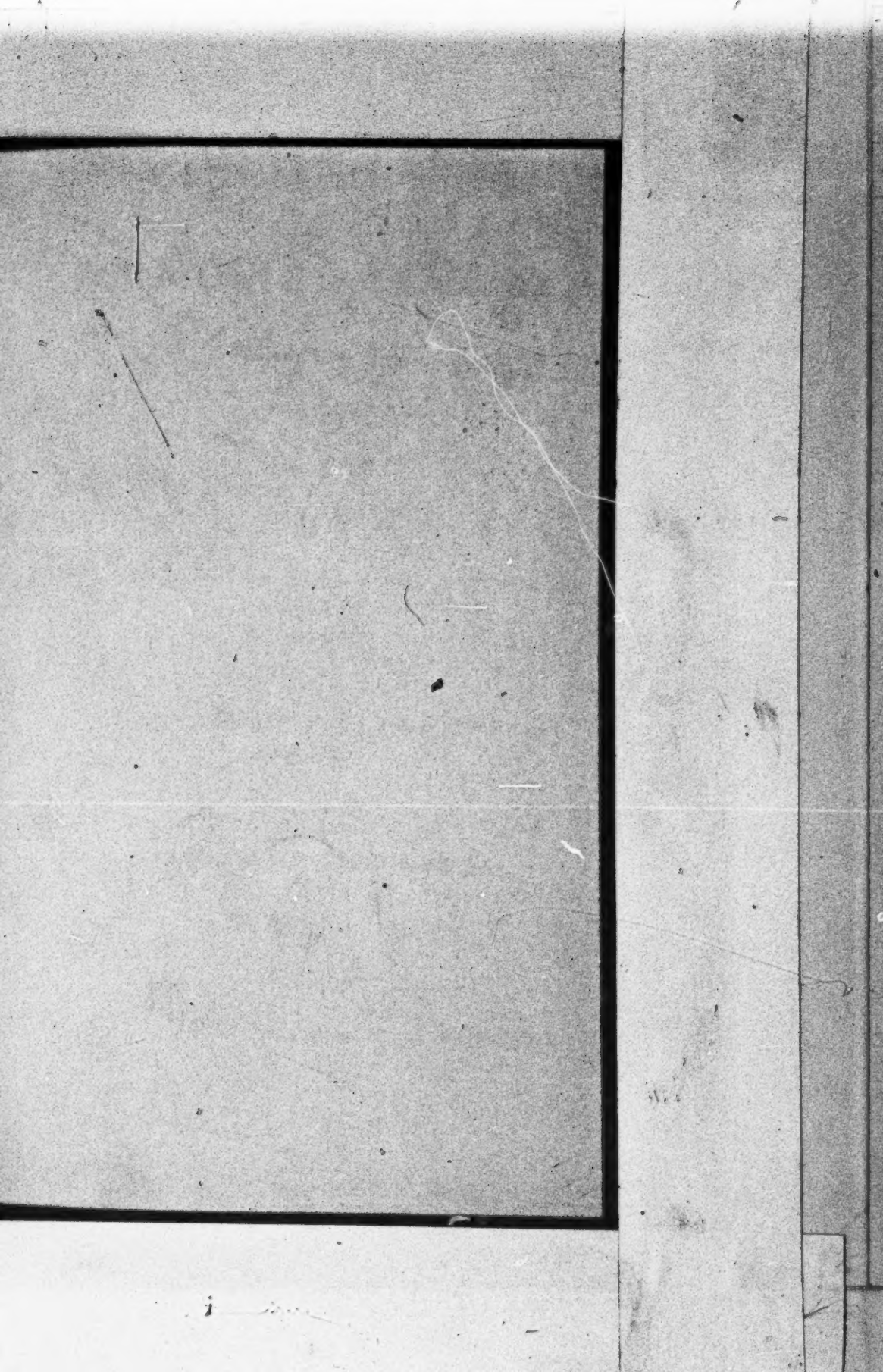
RALPH L. READ,
Counsel for Respondent, Sears, Roebuck and Co.

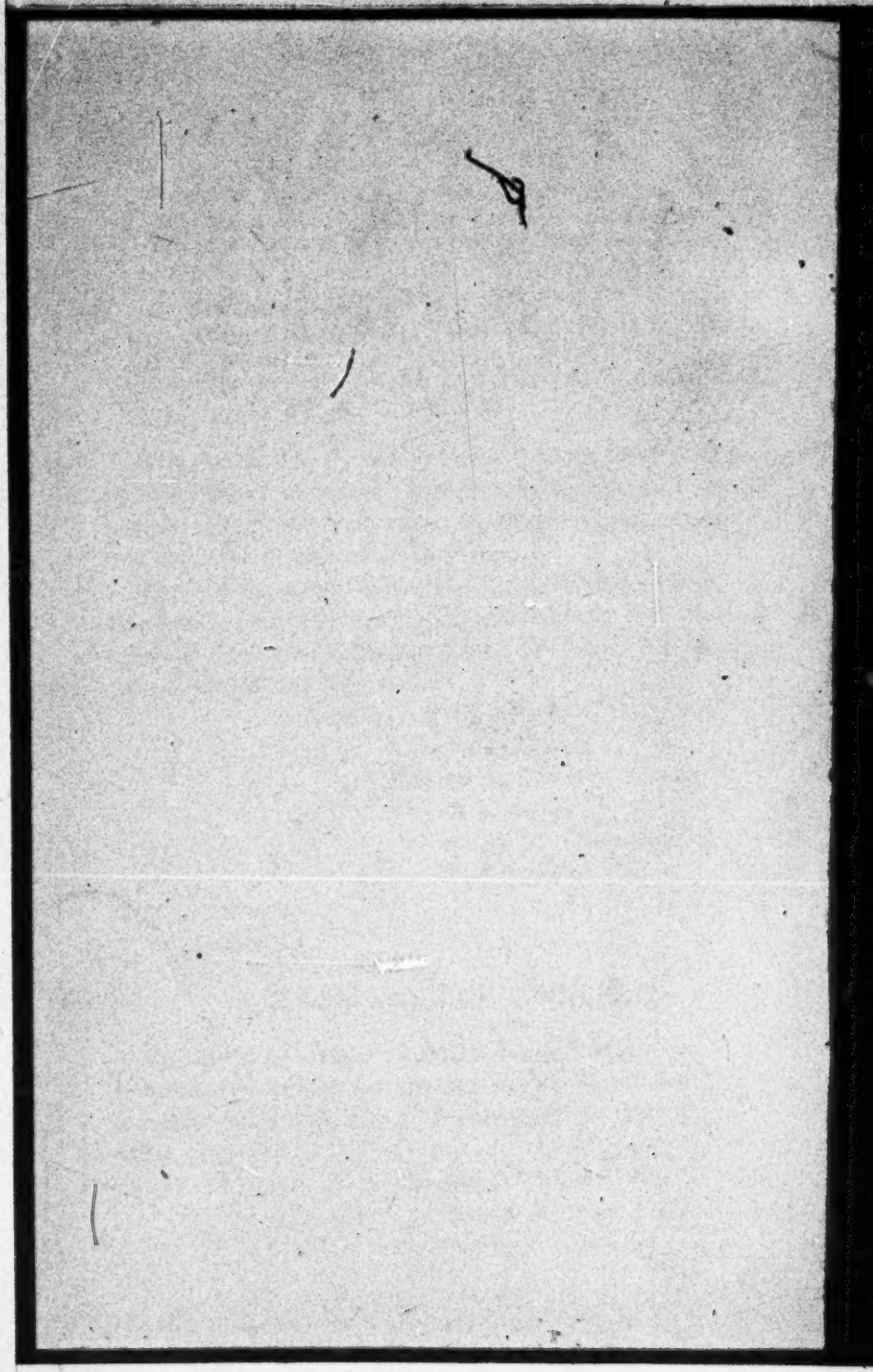
BERT L. KLOOSTER,
Of Counsel.

CERTIFICATE OF COUNSEL.

I, Joseph G. Gamble, counsel for the above named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

JOSEPH G. GAMBLE,
Counsel for Respondent, Sears, Roebuck and Co.





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Supreme Court of the United States

October Term, 1940.

No. 256

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Petitioners,

vs.

MONTGOMERY WARD & CO., INCORPORATED,
Respondent.

PETITION FOR REHEARING.

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Petitioners,

vs.

MONTGOMERY WARD & CO., INCORPORATED,
Respondent.

PETITION FOR REHEARING.

INTRODUCTION.

In petitioning for a rehearing of this case, we do not intend to reargue the principles of law discussed by the opinions in numbers 255 and 256. We assume that this Court has, by the complete absence of any reference to it in the governing opinions, determined to overrule *Connecticut General Life Ins. Co.* v. *Johnson* (1938), 303 U. S. 77, 58 S. Ct. 436, and the general principle therein enunciated, that

> "* * * the limits of the state's legislation to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state."

We assume that this Court has now determined that the several states, once they have a corporation within their jurisdiction for any purpose, may consider "the ultimate thrust of economic benefits" so extended in fixing the charge for those benefits without concern for any limit fixed by the geographic situs of transactions and objects. While we believe that the logical consequences of the overruling of the *Connecticut General* case may well be the destruction of one of the purposes of the Founding Fathers, we assume that no useful end would be served by now attempting a logical rehabilitation of an abandoned precedent.

We propose, however, to show that the opinions as written fail to dispose of the issues implicit in the record before this Court. We propose to show that, as applied to the actual facts disclosed by the record, the opinions as written contain logical inconsistencies. Furthermore, we propose to show that the record contains undisputed evidence overlooked by the opinions which on their own reasoning would require this Court to affirm the result below.

I. The Last Two Paragraphs Of The Opinion In Number 256 Misunderstand And Misinterpret the Stipulated Facts.

Before coming to the more general questions, we wish to point out that one specific portion of the opinion in number 256 is based on a misreading of the record. The last two paragraphs of the opinion quote a stipulation to the effect that

"advertisements have been caused to be printed by the retail stores of the petitioner (Montgomery Ward & Co.) in the State of Iowa, advertising not only retail merchandise, but the ability to complete service through the use of the catalog."

(R. 47-48)

On the principle that

"The effect of admitted facts is a question of law",

this stipulation was held to show the existence of a local activity with respect to "mail order sales".

While the legal effect of admitted facts is within the determination of this Court, certainly this determination must be limited to the effect of facts actually admitted and not to the effect of suppositious facts. The opinion says:

"This stipulation clearly means that respondent has solicited mail order sales in Iowa."

Since the phrase "mail order sales" has been used throughout the record as meaning sales made directly by mail, this Court apparently interpreted the stipulation as meaning that the advertisements amounted to solicitation of sales by direct mail.

This is not the fact, nor was the stipulation intended by either party to give this impression. The store advertisements referred to the ability of the *retail stores* to complete service to the customer by handling catalog orders—not to the general ability of the respondent to sell by mail order. This is the real fact. Constitutional issues must certainly turn upon the actual facts even if ambiguously stated by the inadvertence of counsel.

The meaning of the stipulation is made clear by other passages in the record. The quoted language was that of respondent's counsel; counsel for the State wished it to

be amplified to show not only the fact of such advertising, but the authorization of it, and caused this sentence to be added:

> "3. That retail stores are instructed to include in their advertising information to the public relative to the availability of the catalog service at the stores."
>
> (R. 48)

Use tax returns were made by the respondent for all sales:

> "with which their stores located in the State of Iowa had had some connection and sales made by order offices."
>
> (R. 48-49)

Each retail store had a desk to handle catalog orders for merchandise not carried by the stores:

> "We maintain a mail order service desk in each retail store with a clerk in attendance * * *."
>
> (R. 28)

But as to

> "such orders taken by the retail stores in Iowa and forwarded to the mail order houses for filling * * * the tax is being collected and paid."
>
> (R. 28)

The stipulation thus covered advertisements which the stores were instructed to run advertising the ability of the stores to "complete service"—that is, to supplement through catalog orders any lack in store merchandise. The activity of making these advertisements was merely a part of soliciting orders through the order desks in the retail stores. But as to all sales so solicited the use tax was collected and paid.

The meaning of the stipulation was clear to counsel and to the lower courts. Neither the argument of the State to this Court, nor the dissenting opinion in the Iowa Supreme Court, referred to the stipulation as showing a

closer relationship between the operations of Ward's retail stores and its mail order business than that brought about by the existence of order desks.

We respectfully submit that these two paragraphs should not be permitted to stand. With their misinterpretation of the facts, they may affect other issues to be raised before the Supreme Court of the State of Iowa.

II. The Opinions In Numbers 255 And 256 Are Internally Inconsistent In Their Treatment Of The Question Whether The Sales In Issue Were A Part Of The Business Done In Iowa Or Simply "Related" To That Business.

As we read them, the opinions are not clear on one vitally important point.

The duty of collecting use taxes is described as:

> "the burden which Iowa has exacted as a price of enjoying the full benefits flowing from its aggregate Iowa business."
>
> (Opinion in number 256)

Here the Court seems to say, with complete clarity, that the mail order sales in issue were not themselves a part of the business done in Iowa, but were among the benefits "flowing from" that business.

The same phrase is repeated elsewhere:

> "Since Iowa has extended to it that privilege (of doing business in Iowa), Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business."
>
> (Opinion in number 255)

The same thought is implicit in a later statement about the sales in issue:

> "Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa."
> (Opinion in number 286)

However, a sentence later, the opinion speaks of these sales as:

> "a part of that business though none of respondent's agents in Iowa actually solicited or placed them."

and earlier had said:

> "Yet these orders are still a part of respondent's Iowa business."

The passage ends with the conclusion that these sales might properly be included

> "in the global amount of benefits which respondent is receiving from Iowa business."

These statements on their face appear to be mutually inconsistent. Whether this Court held these sales to be "a part of the business done in Iowa" or merely part of the benefits "flowing from that business" is a point of great importance. The two possible holdings are distinct in logic, and lead to entirely different ultimate results.

We do not believe that this Court meant to hold that, in any sense which has been previously given to the language of the law, these sales formed a part of the course of respondent's Iowa business. If sales solicited and filled as these mail order sales were solicited and filled amount to business done in Iowa, then other mail order houses making sales in an identical manner are also doing business in Iowa and are subject to compulsory qualification there. Yet the opinion says of such other mail order houses:

"But these other concerns are not doing business in the state as foreign corporations. Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price."

(Opinion in number 255)

Such sales of other mail order companies represent, just as much as respondent's direct mail order sales, the "ultimate thrust of the economic benefits and burdens of transactions within the state",—the ultimate thrust of the customer transactions of merchandise selection, order making, and receipt of goods. These are the only transactions in Iowa which are directly connected with the sales in issue. If they do not make the sales of other mail order companies the doing of business in Iowa, they do not make the sales of the respondent the doing of business in Iowa.

The answer is not to be found in such a phrase as the "impotence of state power" which the opinion quotes from *Wisconsin* v. *J. C. Penney Co.*, ___ U. S. ___. If the ultimate thrust of transactions within Iowa by others entitles Iowa to impose a burden as upon business done within Iowa, the state would not be impotent to enforce the burden merely because the corporation had not qualified and appointed a statutory agent.

The point is this: the power of Iowa to impose this burden arises if at all from the fact that it is a price for benefits "flowing from" the privilege of doing business in Iowa. The one issue is whether in fact the sales in issue did "flow from" the other business actually done in Iowa.

To the extent that the language of the opinions includes phrases which customarily import different and inconsistent meanings, we submit that the opinions should be clarified and the real issue reexamined to see how the record bears upon it.

III. The Opinion Overlooks The Many Facts Which, In Addition To The Facts Referred To In The Opinions, Clearly Demonstrate That The Sales In Issue Were Not In Any Sense The Result Of "Benefits Flowing From" Respondent's Course Of Business In Iowa.

If the opinions in these companion cases are predicated on the belief that the sales in issue were among the "benefits flowing from" the business done in Iowa, we respectfully submit that the facts set forth in the record conclusively disprove the correctness of such a belief.

The opinions proceed as if the respondent's case stood or fell upon its proof that

> "there are no acts of respondent in Iowa in regard to any of the orders sent to the out of state mail order houses".
>
> (Opinion in number 255)

Such proof, says the opinion, is "immaterial" and "wholly irrelevant". Consequently:

> "It does not permit respondent to escape the burden which Iowa has exacted as a price of enjoying the full benefits flowing from its aggregate Iowa business".

The irrelevance of such facts derives from the Court's abandonment of its former rulings that:

> "* * * A state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere."
>
> (*Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77 at p. 81, 58 S. Ct. 436 at p. 438)

As a consequence of Iowa's power to disregard the situs of activities over which it desires to exercise control,

> "Whatever may be the inspiration for these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa."
>
> (Opinion in number 255)

We propose to show that the rightfulness of such an assumption is conclusively rebutted by the record, even if the evidence as to the situs of respondent's activities be, standing alone, irrelevant and immaterial.

While a

> "presumption of facts supporting constitutionality * * * attaches to all legislative acts",
>
> (*Lawrence* v. *State Tax Com'n*, 286 U. S. 276 at p. 283, 52 S. Ct. at p. 558)

such presumption of the existence of facts is obviously not irrebutable. Certainly the fictional ascription to a legislature of a finding of facts which are palpably untrue is a device which a realistic Court would never adopt.

Nor has this Court adopted it. All three opinions in *McCarroll* v. *Dixie Greyhound Lines*, 309 U. S. 176, 60 S. Ct. 504, examined the legislative assumptions of fact behind a challenged statute; and the majority of this Court held them demonstrably erroneous. And in *Best & Co.* v. *Maxwell* (No. 61, December 23, 1940), — U. S. —, this Court unanimously decided that "in practical operation" —that is, in point of fact—a state statute discriminated against interstate commerce.

We contend that the record in its entirety shows that Iowa could not "rightly assume" that the mail order sales in issue were "related to" or among the "benefits flowing from" respondent's aggregate Iowa business. Our

attack upon this statute was upon a much broader basis than the extraterritorial character of the acts of solicitation, order filling, and shipment involved in these mail order sales.

A. The relationship necessary for the imposition of the burden of tax collection must be more than the fact that all the business is handled by a single corporate entity.

If, as the opinions point out,

"Respondent cannot avoid (this) burden though its business is departmentalized"

(Opinion in number 255)

the converse is equally true; the respondent does not have to suffer the burden simply because respondent's various departments are all a part of a unitary enterprise.

Of course, no part of any unitary enterprise is completely unrelated to any other part. The financial strength derived from profits in one department help the exploitation of the business of other departments. But certainly the fact of such reciprocal relationship does not mean that a state may impose burdens on an entire enterprise of which only a small part is conducted within the state.

Suppose that respondent was qualified to do business in Iowa only in order to operate its single fence fabricating factory within the state (R. 27). Suppose that it had no stores within the state, and its mail order business was exactly comparable to those of its undomesticated competitors. No "impotence of state power" would then prevent Iowa from reaching it for the collection of the use tax. Furthermore, the profits from sales including those to Iowa customers might enhance the respondent's ability to exploit the profit possibilities of its factory. Similarly, the profits of the factory might assist the respondent in obtaining and pricing the merchandise sold by mail orders.

However, we assume that this Court would not hold that such a reciprocal relation between the parts of the unitary enterprise would be in itself sufficient to justify the imposition of burdens of the character imposed by the Iowa use tax act. This Court has never so held. It has said that the relation which must exist to support the exaction of a price for the privileges extended must always be a "fair relationship" (*McCarroll* v. *Dixie Greyhound Lines*, 309 U. S. 176, at p. 181, 60 S. Ct. 504, at p. 506) or a "fiscal relation" (*Wisconsin* v. *J. C. Penney Co.*, — U. S. —).

In the present case, the opinions speak of

> "the burden which Iowa has exacted as a price of enjoying the full benefits flowing from its aggregate Iowa business".
>
> (Opinion in number 256)

and of

> "the price of enjoying the full benefits flowing from its Iowa business".
>
> (Opinion in number 255)

As we read them, the opinions in the present case are predicated on the assumption that "Iowa could rightly assume" that the sales in question were among the benefits which "flowed from" the business done in Iowa, and hence "not unrelated to respondent's course of business in Iowa". The opinions do not intend to justify Iowa's assumption by the generalized relation which exists between all departments of a unitary enterprise, but by the plausible assumption that in some way the sales in question had their origin in the business actually done in Iowa.

If we are correct in this, the opinions are predicated upon an assumption which is definitely rebutted by facts shown by the record which the opinions overlook.

B. Facts overlooked by the opinions clearly rebut any assumption that the sales in question were among the benefits which "flowed out" of the business done in Iowa.

The record is entirely devoid of any evidence to support an assumption that the direct mail order business was the recipient of any "benefit flowing from" the respondent's retail store business in Iowa other than the mail order sales solicited by the stores and order offices as to which the tax was collected (Footnote 1).

Here are facts shown by the record, but not mentioned in the opinions, which demonstrate that the direct mail order sales could not "flow from", or be influenced by, the activities of the respondent within Iowa:

(1) Familiarity of Iowa customers with store merchandise would not tend to increase sales of that merchandise through direct mail order, since only 2% of the merchandise sold by mail order was carried by the stores (R. 27).

(2) The existence of the retail stores in Iowa could not improve the buying power of the respondent with respect to its acquisition of merchandise for sale by mail order, since only 2% of the mail order merchandise was identical with that sold in the stores (R. 27).

(3) Direct and uncontroverted evidence appeared in the record that the retail stores in Iowa were not intended to act as a leader and enlarger for the mail order business (R. 95).

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1. Had the Court been correct in its reading of the meaning of the stipulation referred to in the last two paragraphs of the opinion in number 354, it might have been argued that the direct mail order sales were the result of the advertisements printed for the retail stores in Iowa. But the stipulation in reality referred to something entirely different—sales made through the stores as to which the tax was collected and paid; and thus the advertisements were in no sense the "inspiration" or source of the direct mail order sales in Iowa.

(4) The prices of merchandise in the retail stores were generally higher than prices of mail order merchandise because "retail service is more expensive than mail order service" (R. 42).

(5) Direct and uncontroverted evidence appeared in the record that, through the order desks, stores attempt to divert through themselves as much of the mail order business as possible. Thus "the managers of the retail stores attempt to obtain as many mail order customers as possible" (R. 41). Far from the business done in Iowa being the source or stimulant of mail order sales, every effort is bent to convert the direct mail orders into Iowa business.

The two types of selling—through retail stores and by mail orders—thus involve differences in price, differences in buying habits of customers, and differences in the merchandise sold. These facts, taken together, clearly negative the assumption of any reciprocal relation wherein the privilege of operating a store within a state increases the mail order sales therein.

IV. The Opinions Erroneously Assume That The Iowa Use Tax Act Has Equality As Its Theme And Does Not Discriminate Against Interstate Commerce Or Against Corporations Doing Business Outside Of The State Of Iowa As Well As Within It.

The opinion in number 256 says:

> "Sales made wholly within Iowa carry the same burden as these mail order sales. A tax or other burden obviously does not discriminate against interstate commerce where 'equality is its theme'."

This statement involves a misconception of the use tax act which in itself should, we respectfully submit, require a rehearing of the case.

Sales made within the state of Iowa carry a different and a lighter burden than sales made outside the state for use in Iowa. Some of the differences apparent on the face of the tax and use statutes may be listed as follows:

(1) The sales tax act imposes a tax upon all sales within the state and does not involve any duty to ascertain whether or not the sale is taxable, nor any problem in doing so. The use tax act imposes the duty of ascertaining whether or not merchandise purchased is to be used within the state of Iowa. Obviously the burden imposed upon the seller by the use tax act is a different and a heavier burden than that imposed upon the seller by the sales tax act.

(2) The sales tax act imposes the duty of collection at the time the tax becomes due. The use tax act requires the tax to be collected *before* the tax itself becomes due, since the use tax must be collected at the time of the sale, which is obviously appreciably earlier than the act of use which creates the tax liability.

(3) The sales tax act does not leave room for the necessity of any claims for refund, since the act of sale causes the imposition of the tax. Under the use tax act, the seller may be forced to have later negotiations with the buyer should the buyer after making a purchase intended for use within Iowa actually decide not to use the merchandise there. Incidentally, no provision for a refund of tax already turned over to the state is provided by the use tax act so that in actual effect a tax may be required to be collected and paid over to the state in instances where later events determined that no tax was due. This cannot happen under the sales tax act.

(4) The seller under the use tax act may be required by regulation to give the buyer a receipt for the use tax collected. No such duty may be imposed by the sales tax upon the seller under it.

Enough has been said to demonstrate that by the very terms of the two statutes the Iowa use tax act imposes a different and a much more onerous burden upon the seller than does the Iowa sales tax act.

The argument at this point is not of a kind which may be properly characterized with the language of the opinion in number 255:

> "Respondent is in no position to found a constitutional right on the practical opportunities for tax avoidance which its method of doing business affords Iowa residents."

The argument here is not based upon the method by which the respondent does business but by the fact that the tax is required to be collected under the use tax act at a time when the liability for the tax is not accrued. The difference in the burdens imposed is not due to the method of doing business selected by the respondent but to the different type of duty imposed by the statute.

We respectfully submit that the opinions thus overlook and omit to discuss sound reasons why the challenged statute is unconstitutional, whether because it be regarded as a discrimination against the interstate commerce involved in the mail order sales in issue, or whether it be considered as a discrimination against corporations doing business without as well as within the state in violation of the due process clause (Footnote 2).

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2. The prohibition inherent in the Fourteenth Amendment against state legislation which discriminates against corporations doing business without as well as within the state has been applied by this Court in such cases as Bethlehem Motors Corp. v. Flynt, (1941) 254 U. S. 471, 61 S. Ct. 571.

SUMMARY.

We respectfully request a rehearing of the decision in this case, not only because the opinions announce a radical departure from precedents previously recognized by this Court, but because the opinions clearly overlook certain facts which on the logic employed by the opinions themselves would require the affirmance of the decision of the Supreme Court of Iowa. We feel that a rehearing should also be granted because of the fact that the opinions indicate that this Court did not fully understand the meaning of the facts disclosed by the record and the actual operation of the challenged statute.

Respectfully submitted,

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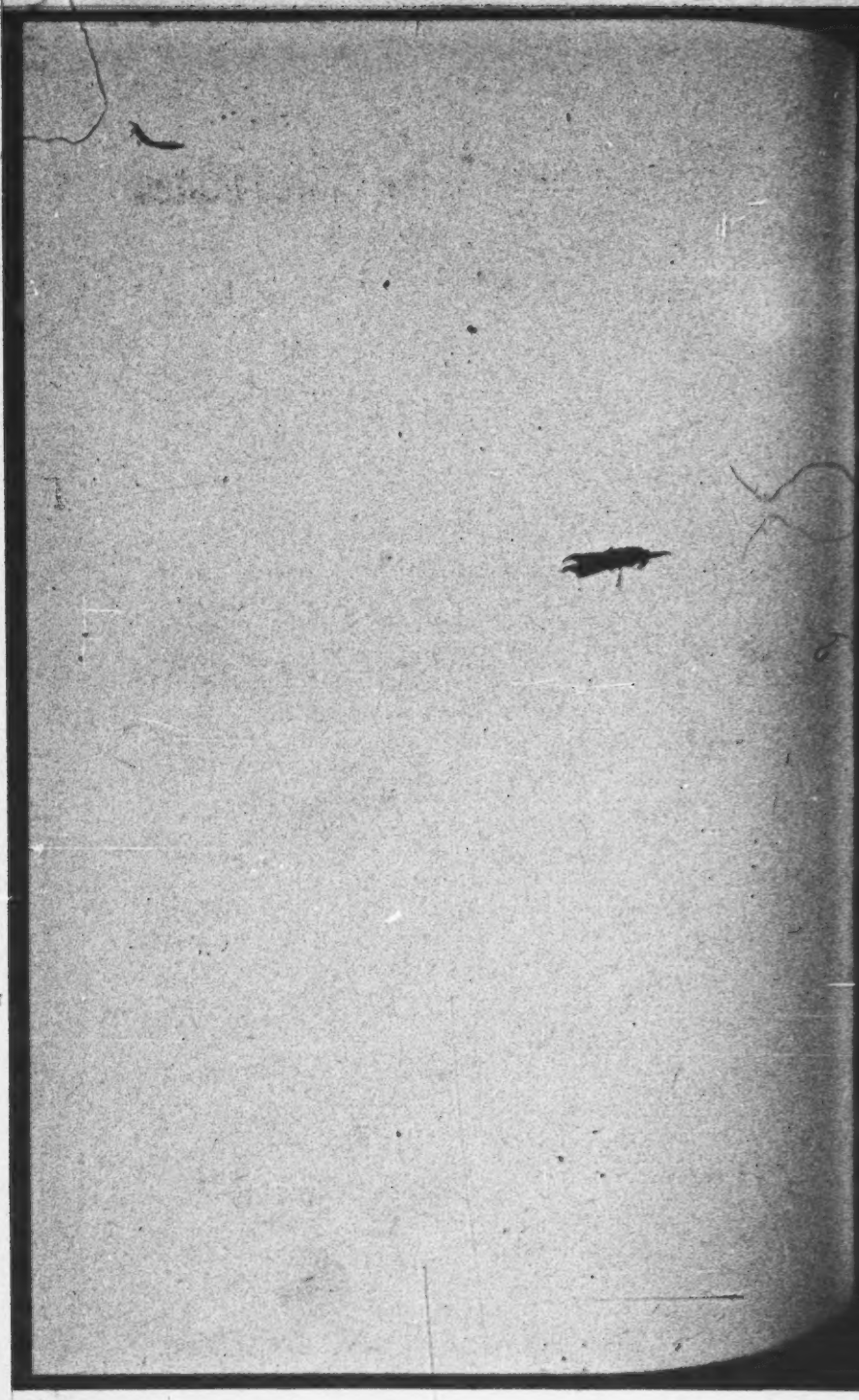
Certificate of Counsel.

I, Stuart S. Ball, counsel for the above named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

STUART S. BALL,
Counsel for Respondent,
Montgomery Ward & Co., Incorporated.



SUPREME COURT OF THE UNITED STATES.

No. 255.—October Term, 1940.

Fred W. Nelson, as Chairman of the State Tax Commission, et al., Petitioners, vs. Sears, Roebuck and Co. } On Writ of Certiorari to the Supreme Court of the State of Iowa.

[February 17, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

This case involves the constitutionality of the Iowa Use Tax (Ia. Code 1939, §§ 6943.102-6943.125) as applied to respondent's mail order business conducted directly between customers in Iowa and respondent's mail order houses located outside Iowa. The Supreme Court of Iowa, in a five to four decision, held for respondent on that issue. 228 Ia. —, 292 N. W. 120. We granted certiorari because of the importance of the constitutional question presented. Jud. Code § 237(b); 28 U. S. C. § 344(b).

The Iowa Use Tax is complementary to the Iowa Retail Sales Tax. Ia. Code 1939, §§ 6943.074, *et seq.* It is a tax on the use in Iowa of tangible personal property at the rate of two per cent of the purchase price.[1] "Use", so far as material here, is defined as "the exercise by any person of any right or power over tangible personal property incident to the ownership of that property." § 6943.102. While the tax is imposed on "every person using such property within this state until such tax has been paid" (§ 6943.-

[1] The Use Tax Act provides in § 6943.103,

"An excise tax is hereby imposed on the use in this state of tangible personal property purchased on or after the effective date of this act (April 16, 1937) for use in this state, at the rate of two per cent of the purchase price of such property. Said tax is hereby imposed upon every person using such property within this state until such tax has been paid directly to the county treasurer, to a retailer, or to the commissioner as hereinafter provided."

The sales tax is a two per cent tax on gross receipts from sales of tangible personal property sold at retail in the state to consumers or users. § 6943.075. So far as material here, the Use Tax need not be paid on property where a tax is required to be paid under the Sales Tax Act. § 6943.104.

103), it is further provided (§ 6943.109) that every "retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state . . . shall at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser . . ." By § 6943.112 the tax constitutes a "debt owed by the retailer" to the state.[2] And if the retailer fails to collect the tax, *etc.*, his retailer's permit (§ 6943.084) may be revoked; and in case of a foreign corporation, its permit to do business in the state as well. § 6943.122.

Respondent is a New York corporation authorized since 1928 to do business in Iowa. It has various retail stores there. It pays the tax on sales made at those stores. It also pays the tax on orders placed at those stores, though shipment is made direct to the purchaser from one of respondent's out of state branches. But it has refused to collect the tax on mail orders sent by Iowa purchasers to its out of state branches and filled by direct shipments through the mails or a common carrier from those branches to the purchasers.[3] On threat of petitioners to revoke respondent's permit because of such refusal, respondent brought this suit for an injunction, alleging, *inter alia*, that the Act as applied violates Section 8 of Article I of the Constitution and the Fourteenth Amendment.

The Iowa Supreme Court held that if respondent had limited its activities to a mail order business of the kind here involved, it would not be doing business in Iowa; that, although technically the tax may be on the purchaser, it must be collected when the sale is made, at which time the property is outside the state; that these sales are separate and distinct from respondent's activities in Iowa. It there-

[2] The retailer must also make quarterly returns. § 6943.113. Penalties are imposed for delay in filing returns (§ 6943.118), for failure to do so or for failure to furnish data required by the commission. § 6943.120.

[3] In 1937 respondent mailed to residents of Iowa about 600,000 small catalogues and 427,000 large ones. Respondent maintains 12 retail stores in Iowa, its investment therein exceeding $500,000. The aggregate sales of the retail stores in Iowa for 1936 amounted to $5,080,000; for 1937, $5,600,000. Its mail order sales in Iowa for 1936 aggregated about $5,900,000; for 1937, about $5,400,000. It estimates that it has some 300,000 Iowa customers of its mail order houses and that in 1937 there were about 1,200,000 orders received from Iowa customers.

One of respondent's witnesses testified that the catalogues and bulletins mailed out were "our sole means of securing" the mail order business. But he also testified, "If a customer inquired from a clerk in the store as to whether or not he would have to pay a use tax upon an order, I believe the clerk would inform him that if he himself mailed the order that there would be no sales tax or use tax charged."

fore concluded that the tax as applied was unconstitutional since Iowa has no power to regulate respondent's activities outside the state or to regulate such activities as a condition to respondent's right to continue to do business in the state.

In passing on the constitutionality of a tax law "we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 280; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 177; *Wisconsin* v. *J. C. Penney Co.*, No. 46, decided Dec. 16, 1940. The fact that under Iowa law the sale is made outside the state does not mean that the power of Iowa "has nothing on which to operate." *Wisconsin* v. *J. C. Penney Co.*, *supra*. The purchaser is in Iowa and the tax is upon use in Iowa. The validity of such a tax, so far as the purchaser is concerned, "has been withdrawn from the arena of debate." *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 583; *Southern Pacific Co.* v. *Gallagher*, *supra*. It is one of the well-known functions of the integrated use and sales tax to remove the buyers' temptation "to place their orders in other states in the effort to escape payment of the tax on local sales." *Henneford* v. *Silas Mason Co.*, *supra*, p. 581. As pointed out in that case (p. 582), the fact that the buyer employs agencies of interstate commerce in order to effectuate his purchase is not material, since the tax is "upon the privilege of use after commerce is at an end." And see *Southern Pacific Co.* v. *Gallagher*, *supra*. Use in Iowa is what is taxed regardless of the time and place of passing title and regardless of the time the tax is required to be paid. *Cf. McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 49.

So the nub of the present controversy centers on the use of respondent as the collection agent for Iowa. The imposition of such a duty, however, was held not to be an unconstitutional burden on a foreign corporation in *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, and *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62. But respondent insists that those cases involved local activity by the foreign corporation as a result of which property was sold to its local customers, while in the instant case there is no local activity by respondent which generates or which relates to the mail orders here involved. Yet these orders are still a part of respondent's Iowa business. The fact that respondent could not be reached for the

tax if it were not qualified to do business in Iowa would merely be a result of the "impotence of state power". *Wisconsin* v. *J. C. Penney Co., supra.* Since Iowa has extended to it that privilege, Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business. Cf. *Wisconsin* v. *J. C. Penney Co., supra.* Respondent cannot avoid that burden though its business is departmentalized. Whatever may be the inspiration for these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts.

Nor is the mode of enforcing the tax on the privilege of these Iowa transactions any discrimination against interstate commerce. As we have seen, the use tax and the sales tax are complementary. Sales made wholly within Iowa carry the same burden as these mail order sales. A tax or other burden obviously does not discriminate against interstate commerce where "equality is its theme." *Henneford* v. *Silas Mason Co., supra,* pp. 583-586; *McGoldrick* v. *Berwind-White Coal Mining Co., supra,* pp. 48-49.

Respondent, however, insists that the duty of tax collection placed on it constitutes a regulation of and substantial burden upon interstate commerce and results in an impairment of the free flow of such commerce. It points to the fact that in its mail order business it is in competition with out of state mail order houses which need not and do not collect the tax on their Iowa sales. But those other concerns are not doing business in the state as foreign corporations. Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price. Respondent further stresses the cost to it of making these collections and its probable loss as a result of its inability to collect the tax on all sales.[4] But cost and

[4] In Illinois respondent undertakes to collect the sales tax on mail orders from its Illinois customers. A notice and schedule of the tax for various amounts of orders are contained in the Illinois catalogue. It asserts that approximately 65% of those orders include an allowance for the tax. Where the orders are not accompanied by an amount covering the Illinois sales tax, respondent does not hold up the order but fills it and sends the customer a bill for the difference. It says that it collects approximately 35% of those de-

inconvenience inhered in the same duty imposed on the foreign corporations in the *Monamotor* and *Felt & Tarrant* cases. And so far as assumed losses on tax collections are concerned, respondent is in no position to found a constitutional right on the practical opportunities for tax avoidance which its method of doing business affords Iowa residents, or to claim a constitutional immunity because it may elect to deliver the goods before the tax is paid.

Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions. Particular facts of specific cases determine whether a given tax prohibitively discriminates against interstate commerce. Hence a review of prior adjudications based on widely disparate facts, howsoever embedded in general propositions, does not facilitate an answer to the present problem.

The judgment is reversed and the cause is remanded to the Iowa Supreme Court for proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice STONE took no part in the consideration or disposition of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

Sciencies where the amount is less than 25¢; 70% to 75%, where the amount is more. On the assumption that on sales to Iowa purchasers the use tax would amount to $100,000 a year, respondent asserts that based on its Illinois experience, the maximum that would be collected would be $68,000. To do that, it says, would entail a direct cost to it of approximately $13,700 a year. These calculations are on the assumption that respondent would put a notice in its Iowa catalogues similar to the one used in Illinois. If such a notice were not given, it asserts that collections of the Iowa use tax would not exceed $35,000 (out of an assumed $100,000) and that its cost would be approximately $18,000.

SUPREME COURT OF THE UNITED STATES.

No. 255.—October Term, 1940.

Fred W. Nelson, as Chairman of the State Tax Commission, etc., et al., Petitioners,
vs.
Sears, Roebuck and Co.

On Writ of Certiorari to the Supreme Court of the State of Iowa.

[February 17, 1941.]

Mr. Justice Roberts.

I think that the judgment should be affirmed.

The respondent, a New York corporation, conducts an interstate mail order business. It has also established retail stores throughout the country. In 1928, to secure the privilege of conducting stores in Iowa as a foreign corporation, it obtained a permit which has been kept in force by payment of the fees prescribed by the State. No question arises with respect to the collection by the respondent of the tax on sales made in stores in Iowa or on sales based upon orders taken in those stores but filled by forwarding articles from a warehouse in another state.

The controversy arises only over pure mail order sales. These are consummated in the following manner: The respondent forwards to persons in Iowa catalogues detailing the articles it has for sale, the prices, and the cost of transporting them. A person in Iowa forwards his written order to one of the respondent's mail order houses located outside Iowa for the purchase of tangible personal property as listed and priced in respondent's catalogue, the order being accompanied by a remittance of the purchase price, plus transportation charges, and usually specifying the method of transportation desired by the purchaser. The order is accepted or rejected at the place where it is received and, if accepted, is filled by delivery to the post office or to a carrier for direct shipment from the extra-state mail order house to the purchaser in Iowa.

This mail order branch of respondent's business is separate and distinct from any activity conducted at its stores in Iowa. In conducting it the respondent is in direct competition with other mail order houses which conduct their business in exactly similar fashion but have no stores in Iowa and are not therein registered as foreign corporations.

The method necessarily pursued in the respondent's mail order business makes it a certainty that it will be unable, by whatever practical efforts it may put forth, to collect the amount of the use tax on all its mail order sales made to persons in Iowa. In 1937 the number of its mail order transactions with some 300,000 persons in Iowa was approximately 1,200,000. Under the statute as attempted to be enforced against its mail order business, if, in 1937, the respondent had failed to collect from each customer the sum involved as tax, it would have been liable to Iowa in the aggregate for two per cent. on approximately $5,400,000,—the volume of its Iowa mail order business in that year. If it had made the effort to collect the tax, the cost of so doing would have been approximately eighteen per cent. of the total tax on the mail order sales made to persons in Iowa and, in addition to that cost, the respondent would have been liable for approximately $38,000 of tax uncollected from purchasers. In addition, as a result of the exaction, the respondent's mail order business will be placed at a serious disadvantage in competition with other mail order concerns which have no retail stores in Iowa and so have a price advantage of two per cent. of sales price as against respondent.

The penalty for failing to collect the tax as agent for the State, or to pay the sum not susceptible of collection from purchasers, as required by the State, will be the revocation of respondent's permit for the conduct of its stores in Iowa, which represent a large expenditure for furniture, fixtures, appliances, and stock, and will entail loss of rental values under long term leases.

I am of opinion that the attempted enforcement of the statute in the manner proposed by the taxing authorities of the State violates both the commerce clause and the Fourteenth Amendment of the Constitution.

First. The respondent's mail order business is interstate commerce,[1] and Iowa may not prohibit the respondent from conducting

[1] Heyman v. Hays, 236 U. S. 178, 186.

that business with her citizens.[2] To attempt so to do would be a violation of the commerce clause of the Constitution.

Not only so, but Iowa may not directly burden such commerce. Therefore she may not tax the privilege of engaging in it; regulate or license its pursuit,[3] or tax the gross income derived from it.[4] And even if the respondent maintained a force of agents in Iowa soliciting orders to be shipped in interstate commerce that fact would not render it amenable to the regulation or taxation of its mail order business.[5]

Thus Iowa may not lawfully license or regulate the business of agents soliciting orders to be shipped in interstate commerce;[6] or limit or condition the right to enforce mail order contracts in Iowa courts.[7] The power to exclude foreign corporations altogether from doing a local business does not enable the State to impose burdens upon the transaction of interstate commerce by a foreign corporation registered in the State; and registration by a foreign corporation in order to do business within the State does not constitute a waiver of the corporation's right to transact interstate business free from the burdens of state regulation or taxation.[8]

Iowa may not abuse its conceded power to tax or regulate the respondent's activities within the State by attempting to compel compliance by the respondent with unconstitutional efforts to tax or burden its interstate commerce.[9] And Iowa may not forfeit, as it proposes to do, the right to conduct a domestic business by reason

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[2] Bowman v. Chicago & N. Ry. Co., 125 U. S. 465; Leisy v. Hardin, 135 U. S. 100; Schollenberger v. Pennsylvania, 171 U. S. 1; West v. Kansas Natural Gas Co., 221 U. S. 229, 250, 262; Louisville & N. R. Co. v. Cook Brewing Co., 223 U. S. 70, 82; The Minnesota Rate Cases, 230 U. S. 352, 401.

[3] International Text Book Co. v. Pigg, 217 U. S. 91, 105, 108; Buck Stove Co. v. Vickers, 226 U. S. 205, 215; Sault Ste. Marie v. International Transit Co., 234 U. S. 333, 340; Lemke v. Farmers Grain Co., 258 U. S. 50; Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90, 94.

[4] Fisher's Blend Station v. Tax Commission, 297 U. S. 650, 655; Adams Manufacturing Co. v. Storen, 304 U. S. 307.

[5] Crutcher v. Kentucky, 141 U. S. 47; International Text Book Co. v. Pigg, *supra*.

[6] Brennan v. Titusville, 153 U. S. 289; Crenshaw v. Arkansas, 227 U. S. 389.

[7] Sioux Remedy Co. v. Cope, 235 U. S. 197, 201; Furst v. Brewster, 282 U. S. 493.

[8] Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426, 434; Hanover Fire Ins. Co. v. Harding, 272 U. S. 494, 507, 517.

[9] Looney v. Crane Co., 245 U. S. 178, 187.

of the refusal of the respondent to submit to a burden upon its interstate business.[10]

Clearly in this instance the effort is directly and substantially to burden the transaction of an interstate business with the state's citizens, in violation of the commerce clause, by the threat of penalizing disobedience by the forfeiture of the right to transact, within Iowa, an independent business which the respondent conducts in accordance with all existing laws, including the law requiring it to deduct and pay over the amount of the Iowa sales tax. Upon reason, as well as upon the unbroken current of authority in this court, Iowa has no such power to burden interstate commerce.

Monamotor Oil Co. v. *Johnson*, 292 U. S. 86, and *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62, relied upon by the petitioners, are not in point.

The first is not apposite because there the company was engaged in the distribution of gasoline in the State of Iowa. This was the only activity drawn in question. The statute merely required the company, in distributing gasoline to users, to add the tax to its sales price and report and return the amount of tax thus withheld. In the second, the collection of the use tax was imposed with respect to property sold by the corporation through its general agents who were doing business in the State of California and were handling articles sold for delivery in that State. As an incident of such sales, the seller was required to add the tax and make return of it to the State.[11]

In justification of the exaction it is said that the purchaser is in Iowa and the tax is on the purchaser's use in that State. But if these facts were determinative they would justify the imposition of a tax or burden, by the state of the purchaser's residence, on every transaction in which goods are sold in interstate commerce. Attention is also called to the fact that Iowa cannot effectively reach its own citizens in order to enforce the use tax on them. This cannot, however, justify the state's attempt to save itself trouble by placing an unconstitutional burden upon in-

[10] Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 34; Pullman Co. v. Kansas, 216 U. S. 56; Atchison T. & S. F. Ry. Co. v. O'Connor, 223 U. S. 280, 285; Western Union Tel. Co. v. Foster, 247 U. S. 105, 114; Frost Trucking Co. v. Railroad Commission, 271 U. S. 583, 593.

[11] Compare Wiloil Corporation v. Pennsylvania, 294 U. S. 169; Graybar Electric Company v. Curry, 308 U. S. 513.

terstate commerce conducted by a citizen of another state. Reference is made to the circumstance that, as a similar tax is laid on local sales in Iowa, there is no discrimination in imposing the tax or its collection upon the respondent, but the argument will not serve to legalize the tax. A state cannot justify a burden on interstate commerce by laying a similar burden on local commerce.[12]

Second. So far as the Fourteenth Amendment is concerned, Iowa may lay a tax on any activity of the respondent which it pursues within the State but plainly, upon the facts disclosed, there is, in the conduct of respondent's mail order business, no such local activity. The Supreme Court of the State correctly found:

"The sales are consummated outside the State of Iowa in each instance. They are separate and distinct from plaintiff's activities in Iowa. The statute here challenged seeks to impose upon plaintiff the obligation that it 'shall at the time of making such sales, whether within or without the state, collect the tax imposed by this chapter from the purchaser'. The sales are made outside of Iowa and the statute requires plaintiff to collect the tax at the time the sales are made. It clearly seeks to regulate activities of plaintiff outside the state. . . . Under repeated pronouncements of the Supreme Court of the United States, hereinbefore reviewed and quoted from, the State of Iowa has no such right."

Delivery to a designated carrier is delivery to the customer[13] and, in this case, is completed outside Iowa. The attempt, therefore, to impose a burden upon such delivery or to regulate the transaction is but an effort on the part of Iowa to regulate or tax an event which occurs outside her borders and over which she has no jurisdiction.[14] This court has recently enforced this principle in a case on its merits more favorable to the State's contention than the present.[15] There it was said:

"It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

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[12] Western Union Telegraph Co. v. Kansas, *supra*; Crew Levick Co. v. Pennsylvania, 245 U. S. 292.

[13] United States v. R. P. Andrews & Co., 207 U. S. 229; compare Garretson v. Selby, 37 Iowa 529.

[14] St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346.

[15] Connecticut General Life Ins. Co. v. Johnson, 303 U. S. 77.

McGoldrick v. *Berwind-White Coal Mining Company*, 309 U. S. 33, is distinguishable from the instant case for there the decision was grounded on the fact that the transfer of title and consummation of sale depended upon delivery by the seller in the taxing state.

In this aspect also the power of the State does not extend to measures which condition respondent's privilege to do business in another state free from the regulation or taxation of Iowa.[16]

The CHIEF Justice joins in this opinion.

[16] New York Life Ins. Co. v. Dodge, 246 U. S. 357, 375; Home Insurance Co. v. Dick, 281 U. S. 397, 407; James v. Dravo Contracting Co., 302 U. S. 134, 139.

SUPREME COURT OF THE UNITED STATES.

No. 256.—October Term, 1940.

Fred W. Nelson, as Chairman of the State Tax Commission, et al., Petitioners,
vs.
Montgomery Ward and Co., Incorporated.

On Writ of Certiorari to the Supreme Court of the State of Iowa.

[February 17, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

The issue in this case is identical with that in *Nelson* v. *Sears, Roebuck and Co.*, No. 255, decided this day. Respondent is an Illinois corporation authorized to do business in Iowa. Respondent operates retail stores and mail order houses throughout the United States. It has 29 retail stores[1] and several order offices in Iowa. It collects the Iowa tax on sales made at the retail stores and on sales handled by those order offices. But it has refused to collect the tax[2] on orders sent directly from Iowa customers to its out of state mail order houses and filled by direct shipments through the mails or a common carrier to the purchasers in Iowa. Respondent, in seeking an affirmance of the judgment of the Iowa Supreme Court[3] (229

[1] The investment in these stores is over $900,000. The approximate sales by these stores in 1937 was $7,716,000.

[2] In the catalogues sent into Iowa there was the following notice:

"To our Iowa Customers:

We believe that certain of the provisions of the Iowa Use Tax law as applied to our business, are unconstitutional. Therefore we are not collecting or reporting the Use Tax on mail orders sent by Iowa customers direct to any of our mail order houses.

Until you hear from us to the contrary, mail in your orders just as you have in the past.

Montgomery Ward & Co."

It was testified that the purpose of this notice was not to intimate to Iowa purchasers that by mailing their orders to mail order houses outside the state they could secure a two per cent differential over purchases made in the state.

[3] One question, not raised by the petition for certiorari, related to the duty of respondent to collect the use tax on sales made in retail stores located near,

Ia. —, 292 N. W. 142) which held that the Iowa Use Tax as applied to these mail orders is unconstitutional,[4] makes substantially the same arguments[5] as were advanced in *Nelson* v. *Sears, Roebuck and Co., supra.* Distribution of catalogues in Iowa apparently involves no act of respondent or its agents within the state. There was testimony that no employee of the mail order houses lives in Iowa; that there are no acts of respondent in Iowa in regard to any of the orders sent to the out of state mail order houses; and that respondent has no machinery for collecting sums due from Iowa customers by individuals within the state, it not being the practice of respondent to refer its delinquent mail order accounts to its retail stores in Iowa for collection. Those facts are immaterial. Some of respondent's employees are in Iowa representing it in the course of business which it is conducting pursuant to its permit to do business in that state. The fact that other of its employees who work in the mail order houses and handle the mail orders here involved are not in Iowa is wholly irrelevant. It does not permit respondent to escape the burden which Iowa has exacted as a price of enjoying the full benefits flowing from its aggregate Iowa business. *Nelson* v. *Sears, Roebuck and Co., supra.*

There is a further fact in this record which makes a reversal of this judgment necessary. It was stipulated that "advertisements have been caused to be printed by the retail stores of the petitioner (Montgomery Ward and Co.) in the State of Iowa, advertising not

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but outside, the boundaries of Iowa, where the purchaser was a resident of Iowa and purchased the property for use in Iowa. The Supreme Court of Iowa, one judge dissenting, held that the Use Tax Act as applied to these transactions was unconstitutional. Chief Justice Hamilton, who dissented from the judgment as respects the mail orders, concurred insofar as sales from the out of state retail stores were concerned, saying that respondent "has no feasible way of knowing or ascertaining where the customer lives or where he is going to make use of the merchandise purchased" and that to impose the burden of tax collection on it would be to give it "an almost impossible task."

[4] Respondent's bill also contained allegations that the Use Tax as applied contravened certain provisions of the Iowa constitution. Those issues, however, were not passed on by the Iowa Supreme Court.

[5] Its experience with the Illinois sales tax shows that only 75% of the Illinois customers remit the tax with their orders. Due bills are sent (except for deficiencies less than two cents) and 58% are not collected. Based on this experience respondent estimates that out of $10,000 of use taxes on mail orders from Iowa customers, it would be able to collect $8,550. If no notices were included in the catalogues sent into Iowa, then based on its Illinois experience respondent estimates that only 42% of the due bills would be collected. In addition to these deficits respondent asserts that it would incur a direct cost ranging from $890 to $1040 for every $10,000 of tax liability.

only retail merchandise, but the ability to complete service through the use of the catalog." This stipulation clearly means that respondent has solicited mail order sales in Iowa. The fact that that solicitation was done through local advertisements rather than directly by local agents as in *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62, is immaterial. Nor is it material that the orders were filled by direct shipments from points outside the state to purchasers within the state. For that method of delivery also obtained in case of some of the orders involved in *Felt & Tarrant Mfg. Co.* v. *Gallagher, supra.*

The effect of admitted facts is a question of law. *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 51.

Reversed.

Mr. Justice STONE took no part in the consideration or disposition of this case.

The CHIEF Justice and Mr. Justice ROBERTS dissent for the reasons stated in the dissenting opinion in No. 255, *Nelson* v. *Sears, Roebuck and Co.*, decided this day.

A true copy.

Test:

Clerk, Supreme Court, U. S.